United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

To be argued by
JOHN VAN VOORHIS
or
SAMUEL N. GREENSPOON

74-2340

BpL

United States Court of Appeals
FOR THE SECOND CIRCUIT

ALLEN & COMPANY,

Plaintiff-Appellant,

against

OCCIDENTAL PETROLEUM CORPORATION,

Defendant-Appellee.

BRIEF OF PLAINTIFF-APPELLANT

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Preliminary Statement*

Plaintiff, Allen & Company (hereafter "Allen & Co.") appeals from a judgment of the District Court for the Southern District of New York dismissing the complaint on the merits after a trial without a jury (Weinfeld, D.J.). The opinion and the matters stipulated by the parties in the pretrial order constitute the findings of fact and conclusions of law (382 F.Supp. 1052, 1068).

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* This action was commenced in the Supreme Court, New York County and removed by defendant to the United States District Court for the Southern District of New York on the ground of diversity of citizenship and amount in controversy.

Figures in parentheses refer to printed pages in joint appendix unless otherwise stated.

Statement of the Issues

Plaintiff is a limited partnership engaged in investment banking and seeks an accounting of profits or damages against defendant for breach of a joint venture to acquire and exploit oil concessions in the Kingdom of Libya.

(1) Allen & Co. asserts that a fiduciary relationship existed between the parties and that defendant's breaches of its fiduciary duties, its failure to disclose material facts regarding the venture or to cooperate with Allen & Co. in obtaining the concessions, and its appropriation of the subject matter of the enterprise, dispose of all of its defenses as matter of law. The Court ruled that there was no fiduciary relationship, no joint venture and no agreement to form one. Allen & Co. contends that these rulings are erroneous conclusions of law which do not arise from, and are negated by, the undisputed evidence.

(2) Next, the Court held that assuming the existence of a contract, Allen & Co. was excluded from participation in the profits of these Libyan oil concessions by the non-performance of a condition (that Galic "turn up" the concessions). Allen & Co. asserts that Occidental, in breach of its fiduciary obligations prevented or impeded the performance of this condition and, as matter of law, is in no position to avail itself of this point and, alternatively, that the condition was performed.

(3) The Court held that, in any event, the contract was cancelled by mutual consent or acquiescence, notwithstanding the fact that Occidental had concealed all of the material facts from its co-adventurer regarding the progress and probable success of the venture in order to appropriate it to its own use and had not given Allen & Co. a chance to compete for, or opportunity to participate in, the subject matter of the venture. Allen & Co. asserts that, as a matter of law, an uninformed consent is no consent between persons standing in a trust relationship and under no circumstance could Occidental appropriate for

itself the subject matter of the venture without giving Allen & Co. opportunity to compete therefor or to participate therein.

In reaching its conclusion on these last two points, the Court assumed the existence of a joint venture but inconsistently disregarded the fiduciary duties that necessarily accompany such a relationship.

The Court's statement:

The Court said that the issues were (76a-7):

"(1) Was there a valid and enforceable contract of joint venture between the parties; (2) if so, did Ferdinand Galic, as the complaint alleges, 'turn up' the concessions granted by the Libyan governmant to the defendant, which are the subject of plaintiff's claim; and (3) assuming a valid agreement, was it terminated with plaintiff's consent and acquiescence?"

Allen & Co.'s position on this formulation by the Court

The undisputed evidence, Allen & Co. respectfully submits, answers each of these issues as follows in favor of plaintiff, based on the fiduciary relationship which the Court below ignored:

(1) The parties became associated in a joint venture with respect to obtaining the Libyan concessions resulting from the conversations and conduct of Dr. Hammer and Herbert Allen from and after September 1964, thus creating the fiduciary responsibilities to each other which are inherent in such a relationship, regardless of whether or not plaintiff's ultimate right to share profits depended upon Galic's turning up the concessions;

(2) Defendant is estopped to contend that Galic did not turn up the concessions by reason of its having discharged Galic and its omission to cooperate with

plaintiff and Galic before Galic had opportunity to complete his functions, and thus impeded him in the performance of the condition on which defendant claims the Allen & Co.'s right of recovery depended. And notwithstanding these obstacles which defendant placed in his way and defendant's failure to cooperate with him or with Allen & Co., Galic did render services which contributed materially to the granting of the concessions;

(3) Under the uniformly applied rule between a fiduciary and a cestui que trust, the cestui cannot be held to have given its consent to or acquiesced in an invasion of its rights by its fiduciary (even assuming that formal consent has been given) unless the fiduciary has disclosed all of the material facts to be considered and acted upon by the beneficiary in granting or withholding its consent or acquiescence. The undisputed evidence is that defendant concealed from Allen & Co. the extremely optimistic prospects of locating oil in Libya and extracting it at a low cost, which were the most important factors that would weigh with Allen & Co. in deciding whether to stay with the project.

The decision of the Court below would have had to have been different upon each of these three questions that it regarded as controlling if the Court had recognized the existence of the fiduciary relationship between the parties from the inception of their dealings.

The Undisputed Facts

The defendant, Occidental Petroleum Corporation, acquired the oil concessions in Libya on March 29, 1966 in the name of its wholly-owned subsidiary Occidental of Libya, Inc. (39a), a Delaware corporation (647a). The announcement of the award was made over the Libyan radio on February 20, 1966 (390) (We will refer to both defendant and its wholly-owned susbidiary as Occidental).

Allen & Co. induces Occidental to seek Libyan concessions

In 1964 when this joint venture was organized, Occidental was not a large oil company. Occidental's annual reports showed that its main business in 1964 was chemicals and fertilizers (Exh. P-130). Its oil and gas revenues from every source grossed only about $6,400,000 in 1964 (1964 Annual Report; Exh. P-130; 1884a) and less than half that sum in 1963 (1963 Annual Report, Exh. P-130; 1884a). It had no oil refining or distributing facilities (Exh. P-130). In contrast, Occidental's competitors for the concessions included the largest and most diversified oil companies in the world (Exh. P-133; 1915a). In competing with those giants, Occidental had only $14,000,000 of working capital and a total net worth of $47,000,000 (1842a), to which was added the $20,000,000 proceeds of a new securities issue (1893a).

With these modest sums at its disposal to conduct the fertilizer and chemical divisions of its business, as well as to provide for the costs of a contemplated Libyan oil venture, Occidental was, in the summer of 1964, admittedly undecided whether to proceed in Libya at all, or in association with some other organization (Exhs. P-21, P-22, P-23; 1752a-7). Indeed, one of Occidental's then Vice-Presidents and attorney in fact in Libya (1889a; 1911a-2), James Lawler wrote to another of Occidental's vice-presidents on February 22, 1964 stating as follows (1755a):

> "I presume you have decided, as Dr. Hammer stated in Paris in January, not to attempt to obtain Libyan concessions alone at present."

Mr. Grey replied under date of February 26, 1964 (1757a):

> "Up to now we have not made a final decision regarding Libya."

It was shortly thereafter that Ferdinand Galic ("Galic") approached his friend Charles Allen, one of the two managing and general partners of Allen & Co. (129a), a limited partnership (35a) and reported to him that he had contacts in Libya which could be helpful in obtaining valuable oil and gas concessions in Libya (130a). Allen & Co. was a major investment banking house and was not directly engaged in the oil business. Hence, Allen & Co. decided to associate itself with clients, including Occidental, in proceeding with any such venture (130a-1).

Herbert Allen, the only other managing and general partner of Allen & Co. (36a) contacted Dr. Armand Hammer, the chief executive officer of Occidental, and related to him what Galic had told Charles Allen (36a; 420a-1; 504a-5); Hammer expressed interest to Herbert Allen in proceeding with Allen & Co. to attempt to obtain oil and gas concessions in Libya (421a, 505a). It is conceded that Herbert Allen made it clear, both orally and in writing, to Hammer, that Allen & Co. wanted to participate in any such Libyan venture (421a; 505a; 1771a). Indeed, Hammer admitted (520a) "Allen & Company were interested in participating in any possible oil concessions in Libya, so therefore I was keeping him [Herbert Allen] advised of what happened".

Herbert Allen wrote to Hammer under date of September 8, 1964 (1771a):

> "Armand, these matters are of such great proportion that you have to think, as you always do, and that is—in a big way. As I explained to you on the telephone, Allen & Company are not in this business for love and we must be recognized."

Dr. Hammer advised Herbert Allen on at least three occasions both orally and in writing, that Occidental would welcome Allen & Co.'s participation in any such venture and that all that remained was to work out the terms of participation (521a). Thus, under date of September 5,

1964 Dr. Hammer wrote to Allen & Co. (1768a):

> "I did say, and I am glad to confirm again, that we would welcome Allen & Company's participation on a mutually satisfactory basis."

It is clear that Occidental's indecision about the risks of a Libyan venture was overcome by the entry of Allen & Co into the picture and its offer to participate in the Libyan venture. Indeed, coincidental with Allen & Co.'s offer to participate with Occidental, for the first time Occidental's Chief Geologist and executive vice-president, Richard Vaughan, began a study of the geological information relating to Libya which was in Occidental's files and planned a trip to Libya in October 1964 to study the situation at first hand (710a; 711a-2). Vaughan admitted that prior to the summer of 1964 he had no knowledge of any Occidental activity in Libya (708a).

The venture is formed and its terms agreed upon

It was in the light of the foregoing undisputed facts that Hammer, Herbert Allen, the so-called Galic group* and others met in London, England in September 1964. Palpably, the only purpose for Herbert Allen to meet with this group in London was to come to final terms with Occidental as Dr. Hammer previously suggested (531a-2; 526a-6).

At that time, on or about September 16, 1964, Allen & Co. and Occidental entered into an oral arrangement with respect to what were later called the "first concessions" (335a-6; 1800a; 573a-4).

These were two specified concession areas in Libya, which Dr. Hammer identified as concession areas then numbered 32 and 59 (573a-4). Area 59 was later subdivided, and contained the concession areas that were later sought by Occidental and which the Kingdom of Libya

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* The Court said that Galic, Ogbi and deRovin were considered a unit of which Galic was the leader (86a).

awarded in the name of Occidental and which became known as Blocks 42B and 44 (461a; 544a).

There are no essential differences in the testimony of Herbert Allen and Hammer concerning the conversations between them at the meetings in London. Dr. Hammer conceded the identity of the subject matter of the venture as testified to by Herbert Allen (viz. the concession areas which were subsequently granted) (573a-4); Dr. Hammer also conceded that profits, losses and costs were to be shared on the basis of 25% to Allen & Co. and 75% to Occidental (537a; 1800a; 573a-4) and added that the costs were to be mutually agreed upon (517a). Herbert Allen testified similarly and added that it was agreed that Occidental was to be the managing venturer (336a).

Thus, the oral conversations in London, England between Herbert Allen and Hammer[1] set forth all of the material terms of a joint venture, to wit, a common subject matter, pooling of interests therein on a 25% and 75% basis, participation on the same basis in profits, losses and costs, and joint control of the costs.

Immediately following the London meeting between Herbert Allen and Dr. Hammer, Occidental, as manager of the venture, signed separate written contracts, each dated September 18, 1964, with each member of the Galic group—Galic, deRovin, and Ogbi (36a, 1773a-5). These contracts between Occidental and the members of the Galic group required them to follow up their contacts in Libya and to seek to assist in obtaining concessions (1773a-5). Since Occidental was managing the venture, Herbert Allen did not partcipate in the negotiation of these contracts, leaving that to Dr. Hammer to handle at the latter's request (337a).

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[1] Dr. Hammer eschewed an opportunity to testify in open Court. His sole testimony was by deposition. Hence this Court has the same right and power as the District Court to weigh his credibility, note his evasive answers, and strike his conclusory views. Indeed, the District Court itself said that Dr. Hammer's testimony as to some matters was not entirely acceptable (106a).

If it is contended that there were differences of substance between Hammer's version of what was said in London and Herbert Allen's version, any such differences were resolved by the subsequent writings and undisputed acts of the parties, which established what occurred, leaving only the legal consequences to be determined.

Subsequent to the London meeting, by letter dated December 9, 1964 (Exh. P-67; 1797a), Herbert Allen wrote to Hammer in part as follows:

> "As per our agreement we are prepared to pay 25% of the expenses whenever they are presented and will mutually with your good self approve or disapprove the various items."

On December 17, 1964 Dr. Hammer wrote a letter to Herbert Allen which sums up what had previously occurred between these parties. It was occasioned by a telephone conversation between these men in which some possible additional concessions were discussed which were referred to in this letter as the "second concessions" (1800a). These did not materialize, but, in this letter, Dr. Hammer took occasion to set forth the substance of the agreement already made regarding the "first concessions", which are the concessions in suit—in saying that the same arrangement should apply to the "second concessions". This letter from Hammer to Herbert Allen is as follows (Exh. P-70; 1800a):

> "Confirming our recent conversations regarding possible concessions in Libya, we agree to the same arrangements with you on the possible second concessions as on the first concessions, namely, Occidental will share on the basis of 75% for us and 25% for you on anything Ferdinand Gallic [sic] turns up. This includes sharing costs and profits."

This letter memorializes the London arrangement, except that it takes for granted that Occidental would be the managing venturer (which is evidenced by the undisputed fact

that Occidental immediately assumed the management of the venture), and except that it omitted what was contained in Herbert Allen's December 9, 1964 letter (Exh. P-67; 1797a) that the parties would mutually approve or disapprove the various items of expense.

After Herbert Allen received Dr. Hammer's letter dated December 17, 1964 (Exh. P-70; 1800a), he telephoned to Dr. Hammer to say that the letter failed to include the reference to mutual approval or disapproval of the various items of expense which had been mentioned in Herbert Allen's letter dated December 9, 1964 (341a).

Dr. Hammer and Herbert Allen thereupon agreed that the words "to be mutually agreed upon" should be inserted following the word "costs" set forth in Hammer's letter to Herbert Allen dated December 17, 1964 (341a). Hammer never disputed that fact (571a). In any event, Herbert Allen inserted the words "to be mutually agreed upon" after the word "costs", signed the letter, and forwarded it to Dr. Hammer so that the latter could initial the change (37a; 1801a). Dr. Hammer initialed the change, and returned the letter so amended to Herbert Allen (37a; Exh. P-71; 1801a).

Nothing was said about whether the costs or anticipated costs had to be submitted in advance, and Dr. Hammer never testified that there was any discussion to that effect (537a-576a). Allen & Co. contends that all that the phrase "to be mutually agreed upon" supplied to the arrangement was to reserve to both parties the mutual control over costs which is the hallmark of a joint venture. This clause would have been implied, but was made explicit because defendant was the managing venturer (See Point I *infra*).

Notwithstanding that mutual control of costs is normally a hallmark of a joint venture the Court below said that it was

> ". . . convinced that, upon the facts of this case, the phrase 'to be mutually agreed upon' was intended by

plaintiff as an escape clause whereby it would not be bound to the proposed venture unless and until it approved any costs incurred. The evidence supports a finding that the parties did not intend to enter into a binding contractual relationship absent mutual agreement upon the costs for the acquisition and exploitation of the project." (83a)

The Court then said:

> "even assuming that the parties intended to be bound by their arrangement, costs, an essential term thereof, upon which the parties never reached an agreement, is so indefinite that the contract is unenforceable. If the parties failed to 'mutually agree' on costs to be charged against the venture, upon what basis could a court fill in that essential term?" (83a).

The Court further said concerning this:

> "I accept Hammer's testimony that at the London meeting, the discussions relative to a 25% participation by Allen & Company reflected plaintiff's purpose to have 'the freedom of action of deciding if they wanted to put up their money or didn't want to put up their money at any stage'—that plaintiff sought and attained such 'freedom of action', thereby leaving open for future agreement an essential term of the proposed relationship." (82a).[2]

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[2] Plaintiff objected and moved to strike this deposition testimony of Dr. Hammer (517a-9) on the grounds that it was not responsive and was merely an attempted interpretation or construction of a conversation. We understood that the Court had stricken all of Dr. Hammer's interpretations and constructions of the spoken word (519a). It was therefore surprising to read the Court's statement that it accepted Hammer's testimony that the discussions demonstrated Allen & Co's purposes "to have the freedom of action of deciding if they wanted to put up their money or didn't want to put up their money at any stage" (82a). Hammer's testimony is palpably conclusory and self-serving interpretation and does not even purport to be part of a conversation.

Allen & Co. contends that Hammer's self-serving, conclusory statements regarding what he deemed to be Allen & Co.'s purpose, which the Court said it accepted, cannot and do not vary the meaning of the transaction as Hammer and Herbert Allen put it in writing in Herbert Allen's letter of December 9, 1964 and in Hammer's amended letter of December 17, 1964; and that in holding that these words ("costs to be mutually agreed upon") prevented or destroyed any joint venture relationship, the Court seriously misconceived the law relating to that form of doing business.

Allen & Co. furnished to the venture the Galic group, who did have knowledge of Libyan affairs, and Occidental entered into a contract with each of them (1773a-5) immediately following the discussions between Hammer and Herbert Allen in London in September 1964 (541a-6). Occidental obtained the services of these individuals to promote the enterprise and achieve the venture's objectives (541a-6). Ogbi, a Libyan, was retained and his services utilized throughout the entire period until after the concessions were actually granted (646a-7). And Occidental admitted that Ogbi supplied valuable services to the venture (666a-9; cf. 1815a).

Contributions to joint ventures, as has been said, can be made by furnishing personnel and know-how, as well as money. Courts are not accustomed to enter into speculative inquiries concerning how valuable people such as Galic, Ogbi or deRovin are or have been in determining whether their being furnished and accepted was enough consideration to initiate a relationship of joint venture and its accompanying fiduciary responsibilities. It is not the function of courts to weigh the usefulness or value to the venture of personnel who are furnished by one venturer and accepted by the other, and this is sufficient to sustain the beginning of the joint venture relationship even if some of the personnel so furnished may have proved to be less valuable than was anticipated.

The record is replete with objective standards to admeasure reasonable costs

The Court's statement that there is no prior demonstrated experience as to costs (84a) simply overlooks documentary evidence prepared by Occidental (Exh. P-204; 1943a *et seq.*). In this record, there is a plenitude of evidence showing costs incurred over the years, in this very industry in Libya (Exh. P-204; 1987a). A report prepared by Richard Vaughan, Occidental's chief geologist, after his initial trip to Libya in October 1964, stated unequivocally that the costs to produce oil in Libya were five to ten cents a barrel, which was to be contrasted with a cost some fifteen to thirty times higher in the United States (1962a; 1945a).

Mr. Vaughan then went on to show the history of costs of drilling for oil in Libya. These costs are relatively small and the Court's statement (84a) that the exploitation of concessions involves astronomical costs which vary from project to project, is simply in conflict with the Vaughan report (Exh. P-204; 1945a; 1987a) and has no support whatsoever in the record. The Vaughan report says that the costs of drilling wells in Libya varied from about $25 per foot to about $150 per foot depending upon the depth of the well (1987a).* Indeed, the Vaughan report is an exhaustive analysis of costs of all sorts involved in the industry in Libya (e.g. 1945a; 1951a-2; 1956a-1964a; 1978a-9; 1982a-7).

The Court's expression of concern about the possibility of astronomical costs and unusual risks (84a), is beside the mark for another reason. Occidental had to invest $3.00 for every $1.00 invested by Allen & Co. (Exhs. P-70; P-71; 1800a-1801a). Occidental's financial statement showed that its net worth and liquid assets were such that it, as managing partner, could not make astronomical expenditures (1886a). Certainly Allen & Co. with its large liquid net

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* When contrasted with known costs in the United States, such costs are small indeed.

worth could easily supply its proportionate share—one-fourth—of any costs (129a, 2007a, 2010a).

Moreover, under the arrangement between these parties, Occidental became the managing venturer by taking over the operation of the enterprise for which it purported to have the know-how, and it was required to notify Allen & Co. when and how much money to supply in order to furnish its 25% of the cost. No notice or demand of this kind was ever made (593; 656a; 663a). Allen & Co never refused to pay its share of the cost of the enterprise or any part of it and indeed expressly offered in writing to do so (1797a).

Occidental was required to notify Allen & Co. of the expenditures made or contemplated as the enterprise progressed, and to consult with Allen & Co. regarding their nature and amount, and to call upon Allen & Co. to contribute its share. As stated above, no notice or demand of this kind, or offer to consult was ever made. Allen & Co. offered and never refused to pay its share in any part of the costs of the enterprise.*

Occidental breached its fiduciary duty to Allen & Co.

The Court's ruling that there was no fiduciary relationship created between the parties was an error in law which

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* Although plaintiff never contributed money to this joint venture, for the reason that it was never called upon by defendant which was obligated to do so as the managing venturer *Wyoming-Indiana Oil and Gas Co.* v. *Weston,* 43 Wyo. 256, 7 P. 2d 206, 211 (1932), *Rayson* v. *Rush,* 258 Ore. 315, 483 P. 2d 73, 79 (1971)), plaintiff made an important initial contribution to the venture other than money. It is held that the contributions of the parties need not be in money, but may be in the supplying of personnel, know-how, ideas or service promotive of the enterprise. (*May* v. *Hettrick Bros. Co.,* 181 App. Div. 3 (1st Dept. 1917), affd. 226 N.Y. 580 (1919); *Rogers* v. *Aronstein,* 185 Misc. 999 (Sup. N.Y. 1945); *Forman* v. *Lumm,* 214 App. Div. 579 (1st Dept. 1925); *Blackner* v. *McDermott,* 176 F. 2d 498 (10 Cir. 1949); *Dean Vincent Inc.* v. *Russell's Realty, Inc.,* 521 P. 2d 334 (Ore. 1974)).

vitiates all of its findings and conclusions. The law is clear that the parties owed fiduciary duties one to the other, from the commencement of the negotiations and continuing thereafter until the venture was completed and wound up. Indeed, *the defendant alleged* in its answer that Allen & Co. had violated "*their fiduciary duties to defendant*" (27a-8). (Emphasis supplied). Certainly, Allen & Co. owed no fiduciary duties to Occidental unless there were reciprocal fiduciary duties owed by Occidental to Allen & Co. In this case because Occidental was the manager, it bore an even heavier burden of fiduciary responsibility. *Meinhard* v. *Salmon,* 249 N. Y. 458 (1928).

But Occidental failed to meet that heavier burden, or any burden of fiduciary responsibility. It concealed from Allen & Co. from September 1964 on, very vital and material information concerning the venture, what Occidental was doing, prospects for the venture, and other matters, and in fact misinformed Allen & Co. as to at least one material matter.

Thus, Occidental did not even disclose to Allen & Co. the details of its contracts with the members of the Galic group (487a; 488a); nor did Occidental disclose to Allen & Co. that its Chief Geologist, Richard Vaughan, had gone to Libya in October 1964 and again in February 1965 and rendered highly optimistic and detailed reports with respect to the proposed venture in Libya (e.g. 728a; 732a-3; 753a).

Among other material facts set forth in the Vaughan report (354a; Exh. P-204; 1943a-1999a), which were not disclosed, was the fact that it cost only five to ten cents a barrel to find and produce oil in Libya as contrasted with a cost some fifteen to thirty times higher in the United States (1952a; 1945a).

Occidental did not disclose to Allen & Co. that the approximate cost of drilling an oil well in the Kingdom of Libya varied from about $25 per foot for wells of 4,000 feet in depth to about $150 per foot for wells of 10,000 feet

in depth (354a; 1987a). Since most fields lay in the 4,000 to 6,000 foot depth range (1982a) the likely cost per well was somewhere between $100,000 to $200,000 (1987a).

Occidental did not disclose to Allen & Co. the enthusiastic reports which it received from its executive and Chief Geologist Vaughan, with respect to the prospects of the Libyan oil venture, that the risks were low, that the costs of producing oil were extremely cheap, and that there was a good likelihood of huge profits (1945a; 1987a; 728a; 732a-3; 753a).

In short, not a single material fact concerning the venture was disclosed by Occidental to Allen & Co. (602a). Occidental kept Allen & Co. completely in the dark (354a; 612a; 665a).

In the meantime, shortly after Hammer received, in mid-March 1965, the report on deRovin (481a) from Allen & Co., Occidental began to prepare the application for concessions (462a), a fact it did not disclose to Allen & Co. (477a; 478a; 480a). The name of Allen & Co. was deliberately withheld from the application without notification to Allen & Co. The application had to be filed no later than July 29, 1965 (459a).

To be contrasted with Occidental's concealment of material facts is the fact that Allen & Co. performed its fiduciary duties and whatever it learned it passed on forthwith to Occidental. Immediately upon receipt thereof, Allen & Co., in good faith, as its fiduciary duty required according to Hammer (640a), forwarded the report on deRovin to Occidental (37a-8; 1822a). This report indicated that deRovin was an unprincipled adventurer (1822 *et seq.*).

Hammer admitted that at the time of the receipt thereof in March 1965 he had decided to terminate the venture (485a; 548a-6). But Occidental did not inform Allen & Co. of its decision to terminate the venture at the time when it was made (485a), nor consult with Allen & Co. concerning what effect, if any, the deRovin report should have upon the

venture. Instead, Occidental conceded that it waited four months until the eleventh hour to "make its move" (485a), i.e. to reveal to Allen & Co. its intention to abandon the venture, freeze out Allen & Co. and go it alone (481a-2; 487a; 491a; 493a; 494a-7; 584a-5; 603a).

The reason that Occidental waited four months to "make its move" was to prevent Allen & Co. from competing for the subject matter of the venture (Exh. P-101; 1830a-1; 485a-487a; 492a-493a; 584a-585a; 610a-11; 616a-617a; 700a). Indeed, in Mr. Vaughan's words Dr. Hammer was playing this matter "close to his vest" (741a).

At the eleventh hour, on July 16, 1965, Occidental wrote to Allen & Co. stating to Allen & Co. that because of deRovin it was pulling out of the venture and Allen & Co. was free from that moment on to pursue the subject matter of the venture on its own, or with others (Exhibit P-124; 1843a).*

The statement in Occidental's attempted termination letter that (1843a)

> "In light of the above, our agreement of December 17, 1964 releases us from any commitment toward Allen & Company. You are likewise free to make any other arrangements you wish"

clearly recognizes that Occidental owed Allen & Co. the fiduciary duty of giving it a chance to pursue the subject matter of the venture on its own or with others, and that there was a viable agreement between Occidental and Allen & Co. which restrained this. But Occidental knew that it was far too late for Allen & Co. to pursue the subject matter of the venture on its own or with others. Less than two weeks remained after Allen & Co. received the letter for it to act and that was clearly insufficient time. Occi-

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* The statement in the July 16, 1965 letter that Ogbi was cancelled was untrue (1843a; 1841a; 2011a; 1810a).

dental thus did not give Allen & Co. the opportunity to pursue or participate in the venture which it recognized that its fiduciary duty obligated it to do.

Occidental knew from its own experience that it took months to prepare an application to the Ministry of Petroleum of Libya (462a). Obviously, as Occidental well knew, when it "made its move" at the eleventh hour (485a), Allen & Co. would not receive the letter dated July 16, 1965 (a Friday), which was mailed according to its heading from California (Exh. P-124; 1843a) until Monday, July 19, 1965 if then. Although, from July 21 to July 24, or July 25, 1965 Hammer was in New York City (840a-1), he did not telephone to Allen & Co. to ascertain its reaction to the letter (141a; 358a; 359a; 840a-1).

Hammer did not disclose to Allen & Co. that he was in New York City making final preparations to go to Libya to file an application on behalf of Occidental alone on July 29, 1965 (141a; 458a; 359a; 840a-1). Instead, on July 24, or July 25, 1965, Hammer departed for Libya where he filed the application on July 29, 1965, which application embraced the very subject matter of the venture, to wit, concession areas 42B and 44, which were the only concessions awarded in the name of Occidental (840a-1; 38a-39a).

Moreover, Occidental's use of the deRovin report to attempt to terminate was a mere pretext or sham. Hammer conceded, contrary to his statements about deRovin in his July 16, 1965 letter (1843a), that he had no information or knowledge that the association with deRovin would in any way prejudice the possibility of obtaining concessions in the Kingdom of Libya (610a). No Libyan ever told Hammer that deRovin would prejudice the possibilities of getting concessions in Libya (610a); and the fact that deRovin was charged as being a Nazi collaborator was certainly no detriment since as Hammer conceded Nazi collaborators were all over the Middle East; they were as welcome as the flowers in spring (610a). There is simply no evidence

that deRovin did anything to prejudice the possibility of obtaining concessions in Libya.

Throughout the period of time from September 1964 and at least up until about July 15, 1965, Occidental had clearly been relying upon Allen & Co. to supply its financial requirements in Libya. Thus, Hammer admitted that "just prior to the time we terminated with Allen" (498a) by sending the letter dated July 16, 1965, Occidental obtained a bank reference letter from the Chase Manhattan Bank dated July 15, 1965 which was Hammer's excuse for not utilizing the name of Allen & Co. in the application for the Libyan oil concessions (498a).

> "We did that—one of the reasons—to make sure that we would not have—there would be no question of our being able to stand on our own legs as far as our financial ability was concerned." (498a)

This letter was assigned by Hammer as a reason why Occidental "terminated with Allen" (498a). The obvious inference is that Occidental felt it no longer needed Allen & Co. and therefore discontinued using Allen & Co.'s name.

The Chase Manhattan Bank letter did not say that Chase Manhattan would back Occidental. Nor did this letter indicate that Occidental was strong financially or had any distribution facilities or that Occidental could financially undertake this venture on its own or could "stand on [its] own legs." All that the Chase Manhattan Bank letter said was that Occidental had profitable operations, good management, a net worth of $47,000,000 and $14,000,000 in working capital, which was very small in comparison with the net worth and working capital of the major oil companies which were also seeking the concessions (1842a).

The Minister of Petroleum of the Kingdom of Libya testified on cross-examination by Occidental that the Chase Manhattan Bank letter was, as is self-evident, a mere bank reference and had no impact with respect to granting the

concessions (970a-2). Indeed, the Libyan committee did not even know what it meant (972a).

Hammer's testimony makes it clear that before Occidental obtained the Chase Manhattan letter (498a-9) it was relying upon Allen & Co. to back it up in Libya and indeed, Occidental was shown to have used Allen & Co.'s name in dealings with respect to the concessions (Exh. P-37; 1775a).

Occidental is estopped to assert that Galic did not turn up the concessions by hindering and failing to cooperate with Galic and Allen & Co.

When Occidental, at the eleventh hour, sought to exclude Allen & Co. from the venture, it also sent telegrams to Galic and deRovin purporting to terminate their services (Exh. P-124; 1844a-5). These telegrams stated that Galic and deRovin were no longer to perform any services for the venture and that Occidental would no longer cooperate with Galic or deRovin so that they could perform any services (1845a). Occidental hindered or prevented Galic from doing what he is accused of not having performed. He was even supplanted by others hired by Occidental to do the same job (125a).

Galic at first rebelled against his purported discharge and he cabled and wrote on August 2, 1965 to Occidental protesting the attempt to discharge him, pointing out that the discharge was "Thirteen Days before D day" (1914a). Galic demanded satisfaction within 30 days (1914a). There is no evidence that Occidental replied to Galic's letter and cable. Accordingly, in his mixed-up English Galic wrote to Allen & Co. on October 13, 1964, stating (1917a):

> "I blocked the way, but if you consider it more interesting that they obtain the concessions, I will go to Libya and manage that way".

Allen & Co. then persuaded Galic to cooperate and to work towards obtaining the concessions (360a; 154a-5).

Galic did perform despite the obstacles put in his way by Occidental

It is indisputable that Galic became well acquainted with the Minister of Petroleum Fuad Kabazi, and that Galic financed production of a movie, the script of which had been written by the Minister of Petroleum; the shooting of this picture began in August 1965 approximately one month after Occidental sent its attempted termination telegram to Galic (1007a-8).

Moreover, Hammer stated that his reason for the delay of four months in attempting to oust Allen & Co. was that he feared that Galic might retaliate by using his influence in Libya to prevent the award of any concessions to Occidental (585a; 616a)*. This is a plain acknowledgment that Hammer knew that Galic had made the acquaintance of the appropriate ministers and had the ability to create substantial good will, or vice-versa, for Occidental and the venture in Libya (616a) which, according to Occidental's counsel were the services he was supposed to perform (125a). Hammer's denials that Galic was capable of performing must be considered in the light of Hammer's admissions that he feared Galic's ability to thwart any concessions (616a).

The payment in August, 1966 by Occidental to Galic of $200,000 plus his expenses (1935a; 1936a-7) on Galic's claim for services in obtaining the concessions (599a; 600a) is proof that Galic performed. Moreover, Hammer solicited Allen & Co.'s help in disposing of Galic's claim (600a)—a natural solicitation of one's co-venturer—and Allen & Co. fulfilling its duty as a co-venturer came to Hammer's aid (600a; 601a; 622a; 362a-3).

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* The Court apparently credited this deposition testimony of Hammer (87a). However, it is clearly incredible since Hammer admitted that none of the Galic group had done or said anything to arouse such fears (610a; 645a-646a). Hammer's alleged fear was no legal excuse for Occidental waiting four months to have "made its move" to oust Allen & Co. at the eleventh hour.

The Court suggested that Galic had no standing or influence with Kabazi at the time the concessions were under consideration and were granted (97a). That suggestion makes no sense whatsoever in view of the Court's finding that Galic had so much influence over Kabazi that he was able to get Kabazi to fabricate and pre-date a letter to Galic (1C2a) for use by Galic against Occidental to support his claim for services rendered in connection with the concessions (599a; 600a).

There is no evidence that the Kabazi letter was predated, but the inconsistency in the Court's findings with respect to the relationship between Galic and Kabazi requires the vitiation of all of the Court's findings on this subject.[3]

The award of concessions was under Libyan law entirely discretionary with the Ministry of Petroleum (2097a-8). Thus, Libyan law provided (2097a-8):

> "In the event of more than one application being submitted for a concession over the same area [that is what occurred here (1915a)] the Ministry of Petroleum Affairs shall have absolute discretion as to which application to accept."

And everyone knew that the King of Libya would make the final decision as to which companies should receive which concessions (551a). Hammer was told this at the September 1964 meetings in London (551a). Who was the King most likely to listen to?—the Minister of Petroleum, Fuad Kabazi, of course, and that is precisely what the King did do—the King accepted Kabazi's recommenda-

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[3] Kabazi, Galic, Hammer, Vaughan and Blom all testified by deposition. Kabazi was a Libyan citizen residing in Libya (870a); Galic was dying at the time (182a) and has since died; but no excuse whatsoever was tendered for the failure of Hammer [who appeared during the live testimony of the Allens], Vaughan and Blom to take the stand. Clearly, this Court has the same power and right as the District Court to test the credibility of their deposition testimony. *Blackner* v. *McDermott*, 176 F 2d 498 (10 Cir. 1949).

tions and that is how the award of these choice concessions was made to Occidental (986a-7).[4]

There was a basic policy difference among the Libyan ministers as to whether independents or major oil companies should be favored. Kabazi favored independents over the majors (907a; 1041a) and Kabazi went to the King to obtain necessary support of his position to favor the independents, such as Occidental (1075a). The King agreed with Kabazi's recommendations (986a-7), and as the record shows it was the independents, not the majors, who received these particular concessions.

Galic had, prior to February 1966, promised to deliver to Kabazi a writing setting forth Allen & Co.'s financial support of the venture and other data (915a) which promise Galic had not complied with. So immediately upon receiving assurance from the King that Kabazi's recommendations would be accepted (986a-7), Kabazi, as a substitute for the promised letter from Galic and to make a record to protect himself from questioning (971a) wrote to Galic on February 16, 1966 (Exh. P-158; 1927a):

> "You will be pleased to know that shortly Occidental Petroleum will receive a favorable reply in its bid for petroleum concessions in Libya.
>
> "As I have repeatedly stated to you, in the interest of my country, our policy in the granting of petroleum concessions is based on capacity of the companies to absorb fully their output. As you well know, the interest of my country is above everything in my heart. I wish, therefore, to remind you, that you have assured me on two very important points:

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[4] Fuad Kabazi's power and standing in the petroleum world is attested to by the words of praise which appeared in the public press extolling his management of the complicated and extensive handling of the more than 100 bids (Deft's Exh. 4, 2025a). The Libyan "Sunday Gibli" issue of August 8, 1965, offered in evidence by defendant, said:

> "Whatever the outcome of the bids may be, one thing is certain: that Minister Fuad Kabazi has enhanced his already high reputation among oilmen everywhere."

"1. that Occidental Petroleum is in a position to absorb any amount of oil found;

"2. that Messrs. Allen & Co. of 30, Broad Street, New York, N.Y., USA, assures the necessary financing involved."

Occidental, over the years, mounted attack after attack upon this letter. Every conceivable charge of forgery, back-dating and the like which could be imagined, were made against this letter (e.g. 125a-7). But in the end Occidental had to concede that the typewriter on which it was written was in existence prior to February 1966 (1580a-1); that the letter was indeed signed by Kabazi (1582a); and there is not a word of evidence in this record to show any back-dating.

As we have noted earlier, the Court stated that this letter was signed and delivered by Kabazi to Galic to assist Galic in his claim against Occidental. Inasmuch as the claim was settled in August 1966 (1934a-1938a) after having been made in March 1966 (1929a), the Court below must have found that it was written, signed and delivered, some time between February 16 and August, 1966. However, there simply is no evidence in this record at all to support the Court's finding that the letter was prepared for the purposes of assisting Galic in his claim against Occidental, nor is there any evidence that Galic used it in his negotiations with Hammer settling Galic's claim.

Thus, the evidence is overwhelming that whatever the words "turn up" mean, the Galic group complied therewith. They certainly did all of the things to create good will for Occidental, to visit Ministers of Libya, to describe the responsibility of an independent company not known "as Standard Oil was" (125a), which Occidental's counsel said they were obliged to do.* Thus, in March, 1965, Vaughan

* In his opening Occidental's counsel said that the expression "turn up" referred to "the legal processes by which representatives create good will, give ideas for geologists, give ideas for preferences, visit all of the Ministers to describe the responsibility of an independent company who is not known as Standard Oil was, and so on, and we did engage people to do that * * *" (125a).

—who was in charge of Occidental's attempt to obtain Libyan concessions and spent most of his time in Libya (657)—wrote to Galic as follows (1815a):

> "In regards to the Libyan project, I found things in a rather confused state of affairs upon my return to Los Angeles. Such resulting largely from understanding and communication problems as I indicated to you would be a very likely result of attempted telephone communications*. The indicated delay in the government's call for formal concession bids will be to our advange as it will allow us to evaluate the alternatives from a more objective point of view.
>
> "Please express my best regards to your wife and again, my appreciation for your graciousness. I hope to see you in the not too distant future, and believe that we can pursue to a mutually satisfactory and profitable conclusion our efforts in Libya."

Vaughan conceded that the "mutually" included Galic (769a).

But Galic was not the only member of the Galic group who was involved in turning up the concessions. There was also Ogbi and he was very important. Occidental conceded that it used Ogbi as the legally required representative in Libya and continued to use and benefit from his services long after it sought to oust Allen & Co. (476a-7; 495a; 503a-4; 514a; 646a-8; 659a-60; 1841a; 1846a-7). Ogbi was the official representative of Occidental when the concessions were granted (646a-7; 929a). He was a public figure of importance in Libya (1040a); he introduced Galic and others of the venture's representatives to the Minister of Petroleum of Libya (870a; 929a); Hammer conceded that Ogbi was honest (496a) and did all that was expected of him to the best of his ability (668a-9). Hammer even loaned money to Ogbi for his political campaign (549a-50; 1831a).

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* The record shows that from November 1964 to March 31, 1965 there were eleven long distance telephone calls between Galic and Hammer (1484a).

But even if they did nothing at all after July 16, 1965, performance on the part of the Galic group was obstructed by Occidental. Indeed, Hammer testified that after he sent the termination telegram to Galic, he avoided all further contact with Galic and did not cooperate with him (607a; 521a), although prior thereto and even as late as June 1965, Hammer made extensive use of Galic's services (491a-3; 494a-497a; 609a; 685a; 694a-5)*.

Accordingly as we shall show, as matter of law, any requirement that Galic "turn up" the concessions was waived, and Occidental is estopped from asserting that Galic failed to "turn up" the concessions.

There was no acquiescence in or consent to the attempted termination

As we shall show, *infra,* as matter of law, there was no acquiescence in or consent to the attempted termination. Consent and acquiescence between persons in fiduciary relationship rests on knowledge of all the material facts. Here Allen & Co. had no knowledge of any of the material facts, which had been concealed or misstated by Occidental. Moreover, Occidental gave Allen & Co. no chance to compete for or participate in the subject matter of the venture and that bars any claim of acquiescence or consent.

The Court's ruling of consent or acquiescence rests on the erroneous legal thesis that Allen & Co. was required to respond to the purported termination letter even though termination was unwarranted and even though Allen & Co.

* Some notion of the Court's misreading of the record can be gleaned from its statements concerning the contract with Ogbi. The Court said (ftn. 87a) that Occidental had previously cancelled [i.e. prior to sending its July 16, 1965 letter to Allen & Co.] Ogbi's contract in June 1965. The documentary evidence shows that Ogbi's September 18, 1964 contract was cancelled (1841a) but that his February 18, 1965 contract (2011a) was not cancelled (1841a). Also not cancelled was Ogbi's February 15, 1965 contract (1810a) which required Occidental "to work exclusively through you [Ogbi] and your channels." Hammer's statement to Allen & Co. in his July 16, 1965 letter (1843a) that Ogbi had been cancelled on June 19, 1965 was simply untrue.

had been kept in the dark by its fiduciary. In so ruling the Court also relied on various documents none of which had ever been seen by the general partners of Allen & Co., and could under no circumstances be used as admissions against interest by plaintiff.

Allen & Co. was under no legal obligation to respond to the "termination" letter (see decisions cited under Point V *infra*).

The Court then said that for a year and a half after receipt of the purported termination letter Allen & Co. made no claim or inquiry as to any alleged Libyan venture (90a). That is inaccurate and is irrelevant in any event as a matter of law.

The Court then construed an underwriter's questionnaire signed by a corporation called Allen & Co., Inc. as a disclaimer of Allen & Co.'s interest in the venture (90a-1). The so-called disclaimer was signed by Herbert L. Stern, as vice-president of the corporation in May 1966 (2038a-9). Occidental had to prove, but it did not, that Charles or Herbert Allen knew of those documents so as to render them admissible or operative as admissions of interest by plaintiff. Although Charles Allen and Herbert Allen were directors of the corporation, neither of them was a stockholder in the corporation nor was Allen & Co. and the Court's finding to the contrary (90a) is simply wrong (2050a).

The record establishes that neither Charles Allen nor Herbert Allen ever saw the underwriters' questionnaire—neither was asked anything about it—and neither knew what it contained (304a; 305a; 427a). The Court recognized that the Libyan venture was handled solely and personally by Herbert and Charles Allen and was unknown to the employees of the corporation of Allen & Co., Inc. The Court however said "I find that each knew of it" [i.e., the questionnaire] (91a). That is an alleged finding without any evidentiary support in the record concerning a matter on which defendant had the burden of proof and is in conflict with all of the evidence in the record.

The Court tried to support its finding by saying that Charles and Herbert Allen created the corporation (91a). Since neither was ever a stockholder they could hardly have created it (205a), but even if they were instrumental in having it formed, that would not prove anything anyway since the corporation was formed in 1964 (36a), two years before the date of the alleged disclaimer (2038a-9).

The Court then said that Stern had been employed by Allen & Co. before the corporation was formed and was under the direct supervision of Herbert Allen and Charles Allen (91a). True, Stern had been such employee but he was not at the time he signed the questionnaire (304a). Nor was he under the Allens' supervision at the time in question since he had full corporate authority (305a).

The Court said that Stern served Allen & Co. after he was employed by the corporation (91a). There is no evidence in the record to support that statement.

The Court said that Stern had access to Allen & Co.'s files (91a). That may be so, but hardly has any bearing on whether Allen & Co. had ever seen the questionnaire since the questionnaire would be in the corporation's files, not the partnership's files.

Finally, the Court said that Stern was not called as a witness by the plaintiff nor his deposition offered (91a). His deposition was not taken, so it could not be offered. Before the trial Stern had suffered a heart attack, retired from the corporation, and lived in Florida (304a-305a). No inference can be drawn against Allen & Co. under such circumstances.

The questionnaire, signed by Stern, said that no officer or director of the corporation has "a material relationship with Occidental" (2038a). The Court said that such representation was material (91a) presumably meaning that Allen & Co.'s participation in the venture constituted a material relationship (2038a).

The question is not whether it was a material relationship but whether Charles Allen or Herbert Allen knew of

the contents of the document or thought it was a material relationship at the time. Both of the Allens said that under the circumstances pertaining, when the questionnaire was signed in May 1966, they would not have considered the relationship to be material (238a); and that they knew nothing about its contents or existence.

The Court then referred to the prospectus issued by Occidental in June 1966 (2042a). This prospectus made no reference to Allen & Co.'s interest in the venture. Allen & Co. had absolutely nothing to do with the prospectus. It was Allen & Company, Inc. the corporation, which was a member of the underwriting group (2042a). The lead underwriter was Lehman Bros. and of course it was then the responsibility of Lehman Bros., its counsel, and primarily of Occidental, to prepare and issue the prospectus and registration statement (Exh. D-11, 2042a *et seq.*)

The law is well established, as shown *infra,* that constructive notice of the prospectus or the underwriters' questionnaire is not to be imputed to Charles or Herbert Allen or to Allen & Co. on account of their positions as officers or directors of the corporation.

The undisputed testimony is that neither Herbert Allen nor Charles Allen ever saw the prospectus and neither of them had anything whatsoever to do with its preparation (304a). In this instance the Court made no express finding that either of the Allens or Allen & Co. had any knowledge of the contents of the prospectus (91a-92a), though the Court said, without any basis, that the omission from the prospectus was an admission againt interest by Allen & Co. (92a).

The next material on which the Court below relied was some correspondence between Allen & Co. and Occidental and Occidental and Allen & Co.'s auditors (92a-93a). The Court thought that this correspondence was "even more compelling" (92a), than presumably the three other items earlier mentioned. This correspondence has no significance whatsoever. The undisputed evidence is that neither Her-

bert Allen nor Charles Allen ever saw this correspondence or had anything whatsoever to do with it (402a).

The first of these documents is a letter (2162a) containing an unidentified signature (402a) from Allen & Co. to Occidental requesting Occidental to advise it concerning certain identified programs and "any other program in which we have a participation" (2162a).

The second letter is a letter from Occidental to Allen & Co.'s accountants which does not mention the Libyan joint venture (2163a). Again, there is no evidence that either of the Allens ever saw this correspondence (402a-3), and the Court makes no finding that either of the Allens ever saw the correspondence (92a-93a).

The Court also said that Allen & Co. had knowledge that Occidental was spending substantial sums, that Allen & Co. made no inquiry as to its costs, never offered to make any financial contribution thereto, and never set up on its books a single penny as a reserve against the Libyan oil venture or made any entry therein as to any contingent liability (93a). The Court is wholly in error.

First, Allen & Co. offered in writing to pay its 25% share of the expenses and so the Court is clearly wrong there (1797a).

Second, Allen & Co. was on a cash basis, not an accrual basis, and as such Allen & Co. could not set up any reserve on its books and in any event it would have been forbidden to do so by the rules of the Securities and Exchange Commission (17 C.F.R. Sec. 240.15.3-1).

Moreover, Occidental, which kept its books on an accrual basis and knew all the facts carried no contingent liability for the Libyan matter on its books (p. 61 of Exh. D-11), and made no mention of any such contingent liability in its prospectus (pp. 9-10 of Exh. D-11).

The rulings of the Court below with respect to acquiescence and consent are irrelevant in law in any event since there can be no consent or acquiescence unless the alleged

consenting party has knowledge of all of the material facts upon which its consent or acquiescence is to be predicated. Here, Occidental had concealed all of the material facts from its coadventurer Allen & Co. and in addition had misstated the facts to Allen & Co. No fiduciary can so act, as matter of law. As we shall show, *infra,* under these circumstances, Occidental was barred from dealing with the concessions on its own behalf and must account to Allen & Co. as matter of law.

Summary of legal arguments

Under plaintiff-appellant's first legal point, infra, *it is argued that where parties are operating under a joint venture relationship, there does not have to be a pre-existing agreement fixing the amount of the costs or a formula from which they may be limited or ascertained, but that customarily they are mutually agreed upon as the enterprise progresses, and that this does not justify one of the parties in appropriating the enterprise to itself without consultation with or demand upon the other coadventurer, even though there be no objective standard by which the nature or amount of the costs could be determined apart from the future agreement of the parties. Neither coadventurer can be excluded at the will of the other without opportunity to continue in the enterprise by making a proportionate contribution.*

Under the second point it is argued that, if objective criteria to measure costs is required, in this instance there were sufficient objective criteria, for the purposes of a joint venture, by which to measure the reasonable costs and extent of the venture, such as the known costs of drilling and other expenses of exploitation in Libya from the previous experience of other oil companies. These were analyzed and computed in detail in a report by Occidental's chief geologist and executive vice-president which was never shown to Allen (Exh. 204; 1943 *et seq.*).

The other points follow in sequence, likewise based upon the undisputed facts as hereinbefore enumerated.

I

Leaving costs to mutual agreement does not destroy joint ventures but is a characteristic feature of such a relationship. Assuming *arguendo* that either party could decline to contribute toward the costs, that would not give the other party the right to seize the enterprise and deny his coadventurer opportunity to contribute and participate.

The parties entered into a joint undertaking to obtain the Libyan concessions as well as to exploit them. But while the Court recognized that this was part of plaintiff's claim (82a, 84a)—and this was unquestionably the fact—*the Court failed to recognize that this established a relationship at the inception of their transactions that was fiduciary in nature* and that could not be disregarded by Occidental. The Court held that the parties' entire joint venture was vitiated by the clause that costs were to be subject to mutual agreement as the venture progressed.

The Court ruled that no business or fiduciary relationship existed between these parties at any time inasmuch as their agreement left the costs "to be mutually agreed upon". It also held that the uncertainty in the amount of the costs which would be required made it impossible for a court to fix the future costs if the parties did not agree upon the costs. *The Court's ruling was founded on the further false assumption that Allen & Co. and Occidental were to stand in no kind of business relationship until after the concessions were awarded.* According to that erroneous theory, Occidental and Allen & Co. owed no duties of any kind to each other, were not bound to any business relationship or by any ties of mutual loyalty, and were free to compete against each other for the concessions, operating on their own, or in conjunction with whatever other conflicting interests they might choose.

This assumption, on which the Court's decision rests, not only violates the intentions of the parties as they expressed

them in writing, but misconceives the nature and obligations of a joint venture. Occidental recognized the mutual fiduciary relationship in its "cancellation" letter to Allen, dated July 16, 1965, by stating that the report on de Rovin released Occidental from any commitment toward Allen, adding significantly ~~that~~ "You [Allen & Co.] *are likewise free to make any other arrangements you wish*" (1843a) (Emphasis supplied). But contrary to the implications of this statement, the Court held that Allen & Co. and Occidental were always free to make competing arrangements because they never were at any time under any obligations toward each other regarding these concessions in Libya.

It is assumed for the purposes of this argument, that under the terms of the London agreement memorialized in the amended letter of December 17, 1964 (Exh. P-7; 1801a), it was contemplated that Allen & Co.'s ultimate right to share in profits depended upon Galic turning up the concessions. But that does not alter the circumstance that from the time of the London meeting forward Occidental and Allen & Co. were fiduciaries. Neither could serve other interests, or thwart or interfere with each other in pursuit of this common objective. Occidental was bound to consult with Allen & Co. and to cooperate with Galic and not to frustrate him in turning up the concessions. *Sidella Export-Import Corp.* v. *Rosen,* 273 App. Div. 490, 491, (1st Dept. 1948); *Polley* v. *Plainsun Corp.,* 7 Misc. 2d 605, 609 (Sup. Queens 1957) mod. o.g. 8 App. Div. 2d 638 (2d Dept. 1959). In short, from then on, they stood in a fiduciary relationship under the form of business organization which the Courts have invented to serve the ends of justice and have somewhat loosely termed "joint venture" in order to enforce fair and open dealing between participants in common enterprises.

(a) The parties were bound by a fiduciary relationship from the beginning of their dealings.

When Allen & Co. commenced its negotiations with Occidental under an acknowledged understanding of Occidental

that Allen & Co. wanted to participate in the venture, fiduciary relationships and duties immediately arose between the parties and never terminated.

The Court's failure to recognize the existence of a fiduciary relationship between these parties is contrary to the ruling in *Libby* v. *L.J. Corporation,* 247 F. 2d 78, 81, (D.C. Cir. 1957) wherein it was stated that from the beginning of the negotiations for a joint venture the parties stand in a fiduciary relation each to the other and are bound by the same standards of good conduct and square dealing as are required between partners. Said the Court (per Burger, J., now Chief Justice) at pages 81-82 of 247 Fed. 2d:—

> " '*This obligation begins with the opening of the negotiations for the formation of the syndicate,* applies to every phase of the business which is undertaken, and continues until the enterprise has been completely wound up and terminated.' (*Dexter & Carpenter* v. *Hooston,* 4 Cir., 1927, 20 F. 2d 647, 652)" (emphasis the Court's).

The Court's holding adopted a well recognized doctrine of law:

> "The fiduciary relation upon which such obligations are consequent does not necessarily await the inception of the relationship of joint venteurers. It may be predicated upon an arrangement to assume such a relationship." 46 Am. Jur. 2d, Joint Ventures § 50, n.2 (1969), citing *Lind* v. *Webber,* 36 Nev. 623, 134 P. 461, 135 P. 139, 141 P. 458 (1913); *FitzGerald* v. *Hull,* 150 Tex. 39, 237 SW 2d 256 (1951); *Hambleton* v. *Rhin*, 84 Md. 456, 36 A. 597 (1897); *Seehorn* v. *Hall,* 130 Mo. 257, 32 S.W. 643 (1895); *Zogg* v. *Hedges,* 126 W. Va. 523, 29 S.E. 2d 871 (1944).

The true rule is also stated in the quotation from Gilmore, Handbook on the Law of Partnership, which is set forth in *Gluck & Co.* v. *Tankel,* 24 Misc. 2d 841, 846, (Sup. N. Y. 1960) affd. 12 A. D. 2d 339 (1st Dept. 1961), viz:

"This obligation to perfect fairness and good faith is not confined to persons who actually are partners, *but applies in all stages of their connection.* There is some authority for the proposition that with regard to the preliminary negotiation of prospective partners the rule of caveat emptor applies, and each may therefore secure for himself such share in the contemplated firm as he can. The tendency of the cases, however, is undoubtedly to require frank disclosure and honest dealing from the very first. *Thus one who contemplated forming a partnership may not appropriate to himself alone the gain from buying at a low figure, and selling to his firm at a higher, the property in which the firm is designed to deal.* (Of special interest on this point see *Fouse* v. *Shelly,* 64 W.Va. 425)." (Emphasis the Court's).

For applications of the above quoted rule holding defendants liable to account as fiduciaries in cases similar to the case at bar, see *Silverman* v. *Bob,* 253 App. Div. 303 (1st Dept. 1938) and *Marston* v. *Gould,* 69 N.Y. 220 (1877).

To similar effect, see also *Valdes* v. *Larrinaga,* 233 U. S. 705 (1914); *Blackner* v. *McDermott,* 176 F. 2d 498 (10 Cir. 1949); *Knapp* v. *First National Bank & Trust Co.,* 154 F. 2d 395, 398 (10th Cir. 1946); *Zogg* v. *Hedges,* 126 W. Va. 523, 29 S.E. 2d 871, 873 (1944); *Fouse* v. *Shelly,* 64 W. Va. 425, 63 S.E. 208 (1908).

Any different rule would mean that a managing venturer could exclude the other venturer by the simple device of giving him no opportunity to contribute to the enterprise in the ratio previously agreed upon. It is assumed for argument under this point that if Allen & Co. had declined to contribute the money demanded by Occidental as managing venturer, in ratio to 75% to 25%, Allen & Co. might have excluded itself from the venture. But that does not mean that it was in Occidental's power to exclude Allen & Co. by denying to it the opportunity to decide for itself whether to contribute, and then appropriate the business

opportunity to itself. If equity would permit such conduct, it would directly undermine the salutary ruling of *Meinhard* v. *Salmon,* 249 N.Y. 458 (1928).

The Court recognized that the "sharing costs and profits" mentioned in Hammer's December 17, 1964 letter "could include the preliminary expenses for the acquisition of the concessions" (82a, 84a), but, inconsistently, the Court declined to hold that obtaining these Libyan oil concessions was part of the joint venture or that Occidental came under any fiduciary obligation to assist and cooperate with Galic and Allen & Co. in obtaining the concessions for the venture.

If the Court had followed this well settled rule, the decision would have been otherwise both with regard to the determination that the parties never entered any relationship which imposed any obligations on them under the law and the determination that Galic did not turn up the concessions when, if he did not do so, he was hindered and prevented from accomplishing that result by Occidental's intervention which instead of assisting him, discharged and refused to cooperate with him and with Allen & Co. before Galic had opportunity to complete his functions.

(b) The ruling by the Court that a Joint Venture cannot be formed without a contract which blue prints the future course of the relationship, is contrary to the whole line of authority on the subject.

Where parties are operating under a joint venture relationship they can leave the determination of costs to future mutual agreement. Indeed, the amount to be expended is customarily agreed upon as the enterprise progresses. Failure to make a detailed advance agreement relating to the amount of costs to be expended does not create a circumstance in which one of the parties is justified in appropriating the venture for itself. Neither coadventurer can be excluded at the will of the other without at least the opportunity to continue in the enterprise by making its proportionate contribution.

In *Lord* v. *Pathe News, Inc.*, 97 F 2d 508 (2 Cir. 1938), this Court upheld the validity and enforcibility of a contract of joint venture which left costs as well as other matters to future agreement of the parties. In so holding, this Court quoted from *Anderson* v. *Blair*, 202 Ala. 209, 213, 80 So. 31, 35 (1918), as follows (p. 510 of 97 F 2d):

> " 'It may be said, no doubt, of the great majority of contracts of joint adventure and of partnership, that they do not point out precisely what each party is to do under them. Such a provision is quite unusual, and, we should say, quite impossible in many cases. The law exacted of each of the parties the utmost good faith and fairness in the prosecution of the common enterprise * * *.' See also, *Alderton* v. *Williams*, 139 Mich. 296, 102 N.W. 753; *Antoniades* v. *Pan American Petroleum & Transport Co.*, D. C. S.D.N.Y. 43 F. 2d 664."

The attorney for the successful party in the *Lord* case was the same counsel who appears on the other side of the question for Occidental in the case at bar. At page 36 of his brief in *Lord* v. *Pathe News Company, Inc.*, it is stated correctly:

> "In many other cases, the Courts have recognized the right of parties to leave the extent of their respective obligations to future mutual consent. In these cases the Courts have consistently stated that both parties are under a duty to act in good faith in an effort to arrive at an agreement.
>
> * * * * * *
>
> "In all of these cases, as in countless others, the allocation of expenses have been provided; the amount had to await future events. *The agreement bound the parties to bear the burden as limited and defined by future circumstance, be it only 'as the occasion warrants' or 'as the parties agree'.*" (Emphasis supplied).

At page 31 of his brief in *Lord* v. *Pathe News Company, Inc.*, the prevailing rule is thus expressed:

> "7. *Lesser Certainty Required in Contracts of Joint Venture.* The Court recognizes the reliance on mutual trust and equal sharing of burdens inherent in partnerships, and agreements of related nature. In such agreements the Courts will strain to make a finding of definiteness. Omissions which might otherwise be material are acceptable, as elements of the joint venture to be met equally as the occasion arises and to the extent that the occasion demands"—citing *Anderson* v. *Blair,* 202 Ala. 209 (1918); *Hoge* v. *George,* 27 Wyoming 423 (1921); *Dolan* v. *Dolan,* 107 Conn. 342 (1928); *Alderton* v. *Williams,* 139 Mich. 296 (1905); *Crawford* v. *Forrester,* 108 Kan. 222 (1921); *Sons* v. *Sons,* 145 Minn. 367 (1920); *Allen* v. *Velie,* 137 Minn. 191 (1917); *Antoniades* v. *Pan American Petroleum & Transport Co.,* 43 Fed. 2d 664 (D.C. S.D.N.Y. 1930)."

These arguments were adopted by this Court in the opinion by Judge Swan in the *Pathe* case.

There is nothing in the Court's findings about retention of mutual control of costs which militates against the existence of a relationship of joint venture. To the contrary, that is an important characteristic of joint venture.

In 2 Williston on Contracts, Sec. 318A (3d ed., 1959), it is said (p. 570):

> "Each of the participants must have or exercise the right of equal or joint control and direction and have a voice in the manner of performance and control over the agencies used in the joint venture, though one party may entrust the performance to another."

The concept of a managing co-adventurer, as provided for herein, is recognized in *Meinhard* v. *Salmon,* 249 N.Y. 458 (1928) but that does not make it mandatory nor deprive the other venturers of their joint power of overall

control, and strengthens the duty of the managing venturer to furnish information and opportunity to the others to participate in the enterprise. There is no requirement in law that Allen & Co., by engaging in a joint enterprise with Occidental, should vest the latter with the sole power of incurring costs. Instead of negating the existence of a joint venture, mutual control of costs affirms it under the established rules.

The provision in the present contract reserving mutual control over the costs of the venture from the transfer of the powers of management to Occidental, simply left the parties in the same situation regarding costs in which they would have been if there had been no managing venturer.

In *Hathaway* v. *Porter Royalty Pool,* 296 Mich. 90, 295 N.W. 571, amended to 296 Mich. 733, 299 N.W. 451 (1941), a joint venture was held to exist in the case of an oil pool where joint control was retained by the venturers in fitting a requirement for unanimous consent to amendments to the bylaws. The Court said that "This kept a large measure of control in the hands of the members of the pool who not only, in these particulars, were obliged to act jointly, but unanimously * * *."

In *Shell Oil Co.* v. *Prestidge,* 249 F. 2d 413 (9 Cir. 1957), a joint venture was held to exist between two oil companies. The Court observed that mutual control over the subject matter of the enterprise or over the property engaged therein is an attribute of joint adventure, although contributions by the parties to the common enterprise need not be equal or of the same character. The Court said (p. 417):

> "Aside from the fact that joint control of the enterprise was provided for in the agreement, and was in fact exercised by Shell through its geologist, there is also the principle recognized in the case of *Eagle Star Ins. Co.* v. *Bean, supra* [134 Fed. 2d 755, 9 Cir.], that while equal voice and joint control of the enterprise is essential to a joint venture, one of the joint adventurers may entrust actual control of the operation to

another, and it still remains a joint venture. This case provides an apt illustration of that principle. As pointed out, the enterprise in which the two companies were engaged was the development of the Give Out Structure. The drilling phase of that enterprise was entrusted by Shell to Rocky Mountain, although as pointed out Shell did exercise some control even over the drilling. However, in the absence of that evidence, the enterprise, with all of the other elements of a joint venture, would not be any the less a joint venture by virtue of Shell entrusting the drilling operation to Rocky Mountain."

See also to the same effect: *McRoberts* v. *Phelps,* 391 Pa. 591, 138 A. 2d 439 (1958) and cases cited in footnote 14 therein.

In *Sample* v. *Romine,* 193 Miss. 706, 8 So. 2d 257 (1942), a joint venture was upheld in oil and gas leases where the Court said:

"In [joint adventure] cases, although the title to the property is permitted to be taken in the names of some of the co-adventurers, the rights of the others are not impaired thereby, and the one holding the title becomes in equity a trustee for all. The trust thus imposed follows the property until it passes into the hands of innocent bona fide purchasers."

"The relationship between the joint adventurers is fiduciary in character and imposes upon all the participants the utmost good faith, fairness, and honesty in their dealings with each other as respects the enterprise. 'This is especially true of those * * * to whom the property involved therein is intrusted.' (30 Am. Jr. pg. 695, Sec. 34.)" (8 So.2d at 262).

Two California decisions held that joint ventures were created notwithstanding that costs were to be mutually agreed upon by the joint venturers. *San Francisco Iron & Metal Co.* v. *American Milling & Industrial Co.,* 115 Cal. App. 238, 1 P. 2d 1008 (Dist. Ct. Ap. Cal. 1931) held a

joint venture agreement to be binding for the purchase and sale of certain railroad cars wherein the buying and selling prices covering the subject matter of the venture were "to be mutually agreed upon and accepted by both parties hereto mentioned." In short, not only were costs and the amount of the investment subject to mutual agreement, but the prices to be charged on the sale of the subject matter were likewise so subject.

The opinion by the Court in that case is apposite throughout, and particularly the following statement (p. 1011 of 1 P. 2d):

> "As said in *Goss* v. *Lanin,* 170 Iowa, 57, 152 N.W. 44, 46, which appears to be one of the leading cases, and is cited by both parties: 'It is not necessary that there should be a specific formal agreement to enter into a joint enterprise, or that the interests of the parties should be definitely settled in such agreement, or that there should be a formal agreement as to sharing in the profits. If there be a joint enterprise proven, either by direct evidence of a mutual agreement to that end, or by proof of facts and circumstances from which it is made to appear that such enterprise was, in fact, entered into, the law fixes their rights. [Citing cases]'. In other words, to appropriate the language of the court in *Anderson* v. *Blair,* 202 Ala. 209, 80 So. 31, 35: '* * * The great majority of contracts of joint adventure and of partnership * * * do not point out precisely what each party is to do under them. Such a provision is quite unusual, and, we should say, quite impossible in many cases.' "

The other California case referred to is *Lasry* v. *Lederman,* 147 Cal. App. 2d 480, 305 P. 2d 663 (Dist.Ct., App. 1957). It upheld a joint venture agreement to purchase, renovate and lease certain real property, holding that the fact that the contract left to the future mutual agreement of the parties what proposed improvements were to be made, would not defeat the creation of a joint venture. The Court

remarked (p. 665):

> "The law requires little formality in the creation of a joint venture and the agreement is not invalid because it may be indefinite with respect to its details."

In his letter dated December 9, 1964 to Occidental which preceded the letter of December 17, 1964, Herbert Allen stated (Exh. P-67, 1797a):

> "As per our agreement we are prepared to pay our 25% of the expenses whenever they are presented and will mutually with your good self approve or disapprove the various items."

No demands for payment or for approval of costs were ever made on Allen & Co. by Occidental. Occidental was to take the lead in management, but as in the case of other joint ventures, the parties were to proceed using their mutual judgment regarding the expenses and progress of the enterprise. Occidental was under a fiduciary duty to consult with Allen & Co. and keep Allen & Co. informed. It had no license to go ahead alone, without consultation or request for contribution from its co-adventurer.

(c) Occidental's appropriation of the subject matter of the venture mandates that it account to Allen & Co.

As a fiduciary Occidental was barred from dealing in any way with the subject mater of the venture, much less appropriating it for itself, without an honest disclosure of all of the facts and an opportunity to Allen & Co. to reap its end of the bargain. Concededly, Occidental did neither—to the contrary, at the eleventh hour it attempted to oust Allen & Co. from the venture and appropriated the subject matter thereof unto itself.

It will not do for Occidental to argue that had the facts been laid bare Allen & Co. might possibly have withdrawn or consented to withdraw from the venture, or that Allen & Co. could not have succeeded in any event. That argu

ment was given short shrift by Chief Judge Cardozo in *Meinhard* v. *Salmon,* 249 N.Y. 458, 465 (1928), as follows:

> "The trouble about his conduct is that he excluded his co-adventurer from any chance to compete, from any chance to enjoy the opportunity for benefit that had come to him alone by virtue of his agency. This chance, if nothing more, he was under a duty to concede. The price of its denial is an extension of the trust at the option and for the benefit of the one whom he excluded.
>
> "No answer is it to say that the chance would have been of little value even if seasonably offered. Such a calculus of probabilities is beyond the science of the chancery."

It will not do for Occidental to argue that Allen & Co. might not have been willing to meet its share of the expenses, or that Galic would have failed, or that any other conceivable factor might have altered the end result. Fiduciary responsibilities cannot be discarded on any such speculation. As was noted in *Meinhard* v. *Salmon, supra* (p. 464 of 249 N.Y.):

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions (*Wendt* v. *Fischer,* 243 N.Y. 439, 444). Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this Court."

In *Delmonico* v. *Roudebush,* 5 Fed. 165 (D. Colo. 1880) arguments similar to those made here by Occidental were

rejected. The Court graphically described the situation and the penalty for failure to disclose and appropriation of the subject matter by a fiduciary (pp. 170-1):

> "Whatever the relations of the parties may be, if they have united for a common purpose they must be loyal to that purpose, and no one or more of the number can, without the consent of his associates, appropriate to his own use the property of all. The use of the contract with the Denver party to secure the title of the property in the Colorado Springs party, was a conversion by Roudebush of the property of his associates which equity will not sanction. It matters not that by its own limitation the contract would soon expire, and thus become lost to the plaintiff. There is nothing to show that the plaintiff would have furnished the money to be paid under that contract in order to acquire the title of the Denver party; and without such payment the contract must have failed, and all benefit and advantage therefrom would have been lost to plaintiff. But the fact remains that at the time of the appropriation by Roudebush the plaintiff was interested in the contract, and the use of it by Roudebush was without his consent. This is enough to enable the plaintiff to share in the advantages secured by Roudebush from the use of the contract; and the circumstance that something more than securing the title of the Denver party was done by Roudebush, will not defeat that claim."

See also to the same effect: *Granik* v. *Perry,* 418 F. 2d 832, 837-8 (5 Cir. 1969); *Johnson* v. *Koyle,* 5 Utah 2d 9, 295 P. 2d 834 (1956); *Lindsay* v. *Marcus,* 137 Colo. 336 325 P. 2d 267 (Sup. Colo. 1958).

In *Byrne* v. *Barrett,* 268 N.Y. 199 (1935), the New York Court of Appeals made it clear that defendant's failure to lay bare the facts and its acquisition of the subject matter of the venture is all that is required for liability. The Court there said (p. 207 of 268 N.Y.):

> "His position was not simply that of plaintiff's deputy with respect to this transaction; his knowledge of it was superior to theirs. He was the managing partner in the venture, and he was for this reason under an active duty of full disclosure to them, not simply of refraining from deceiving them (*Meinhard* v. *Salmon*, 249 N.Y. 458). It is true that, unlike an ordinary employee, defendant had a potential interest in the outcome of the negotiations which he may have been entitled to continue. He might have offered to continue in association with them on this transaction, as he did on another; but his own testimony establishes that he did not. He might have acquainted them fully with the status of the matter and given them an informed choice of whether they wished to surrender the matter to him or to compete with him on even terms. This he did not do. Under these circumstances a finding of actual fraud or bad faith is unessential. He may be held liable even though not 'guilty of a conscious purpose to defraud.' (*Meinhard* v. *Salmon*, *supra*, 467, 468)."

These salutary principles of law which bind all fiduciaries moot all factual issues herein. They require no resolution of conflicting testimony. They apply and mandate judgment for plaintiff whether or not Galic turned up the concessions; or whether the uninformed Allen & Co. acquiesced in the purported abandonment.

Those principles of law apply and mandate judgment for Allen & Co. because of the existence of a fiduciary relationship; because of the failure of Occidental to lay bare all of the facts thereby depriving Allen & Co. of an opportunity to reap its end of the bargain; and because Occidental appropriated to itself the subject matter of the venture. (See also the cases cited under Point IV, *infra*.)

II

There were sufficient objective criteria, for the purposes of parties acting in good faith in a joint venture, by which to measure the reasonable costs and extent of the venture, if such criteria were necessary.

The Trial Court was in error in ruling that one joint venturer can exclude another from participation in the enterprise although denying him opportunity to subscribe on a rateable basis as shown above under Point I. The Court was also in error in holding that there was no prior demonstrated experience which could be drawn upon to determine whether costs are reasonable and may be reasonably incurred (84a). If objective criteria are required and the law seems to the contrary, they are present here.

The Court posed the rhetorical question "If the parties failed to 'mutually agree' on costs to be charged against the venture, upon what basis could a Court fill in that essential term?" (83a). The Court attempted to distinguish *Lord* v. *Pathe News, Inc.*, 97 F. 2d 508 (2 Cir. 1938), by stating (84a):

> "This is not a situation where prior demonstrated experience in an industry can be drawn upon in deciding what costs are reasonable and may be reasonably incurred, despite initial failure in carrying out or exploiting the purpose of a joint venture, as was in the case of *Lord* v. *Pathe News, Inc.*, so heavily relied upon by plaintiff."

The Court acknowledged that "Here the questions are close * * *" (81a).

An examination of the *Lord* case does not support this distinction. That case dealt with a contract between a well-known author named Lord and a motion picture company. Lord was to undertake an around-the-world cruise in a specially outfitted ship and Pathe News was to supply personnel and equipment to produce and distribute

motion pictures of the venture. The contract was held to be valid as providing for a joint venture although it expressly stipulated that "the distribution contract and other expenses shall be okayed by both parties". This Court said concerning this clause (97 F. 2d 508 at p. 510):

> "We construe this to mean that before the distribution contract was let each party must pass upon it to say whether he thinks it protects the common interest of their joint venture. So too, as to 'other expenses', that is, whether the proposed expenses were reasonably appropriate and necessary to the proper exploitation of the pictures. This was not too uncertain a standard; it could be referred to the customary way of exploiting such films. See *Wells* v. *First Nat. Exhibitors' Circuit,* 149 Ga. 200, 99 S.E. 615; *T. H. Flood & Co.* v. *Bates,* 7 Cir. 283 F. 364. The 'other expenses' refer to the costs of distribution, advertising and prints referred to in clause (4), not to the expenses of making pictures mentioned in clause (3). We hold that the contract as it reads is not too indefinite to be capable of enforcement."

As to the costs of making the pictures, as distinct from the contracts and expenses of distribution, an employee of the defendant named Begg was to "have charge of the making of the motion pictures". The Court said (p. 509):

> "This gave him discretion as to what to photograph and how much to spend upon a picture, but he was bound to use his judgment in good faith to advance the common business."

This Court ruled that the standard by which the mutual agreement of the parties was to be judged regarding expenses of distribution, promotion and advertising was nevertheless (p. 510 of 97 F. 2d):

> "Whether the proposed expenses were reasonably appropriate and necessary to the proper exploitation of the pictures."

The Court's holding herein that *Lord* is not applicable to the case at bar since it "is not a situation where prior demonstrated experience in an industry can be drawn upon in deciding which costs are reasonable" (84a) is without justification both in fact (Exh. P-204; 1943a *et seq.*) and law.

The standards of the oil industry are at least as applicable to this contract as those of the film industry of 1932 were to the *Lord* case especially where as here the record establishes the standards in Libya where the concessions were located.

May Metropolitan Corp. v. *May Oil Burner Corp.*, 290 N.Y. 260 (1943) dealt with a franchise contract which provided that the distributor should have an option to renew provided that he signed a new quota agreement in excess of the previous year's quota *"and to be mutually agreed upon."* (Emphasis supplied). The defendant in that case insisted on an increase in quota from 100 to 250 of the items to be sold. The plaintiff denounced this demand as arbitrary and unreasonable, and requested the defendant to prepare a contract with a quota of 150. That was refused by defendant which asserted that it was under no obligation for the reason that "there was no agreeable mutual basis" for renewal as required by the terms of the contract. The Court said (p. 266):

> "Reasonable men may well read all that language together as importing that defendant shall not impose, as a further condition for renewal, the consent of plaintiff to an unreasonable increase in quota. In other words, the contracts as written do not negative an implication of reasonableness and good faith."

This is particularly pertinent to the case of a joint venture, with respect to which joint control has been consistently recognized as one of the distinguishing features of the relationship.

In *Benvenuto* v. *Rodriguez*, 279 App. Div. 162 (1st Dept. 1951), regarding a contract stating that there is to

be no further claim by either party against the other in the event that a sale is not completed because of misrepresentation "or for any other reason," the Court said (pp. 164-65):

> "Ordinarily, businessmen do not go to such trouble and expense in order to reduce to contract form an understanding, that at some date in the future they will consummate a deal on certain terms, if at that time both are still of the mind to do so. A writing of such character is binding on no one. . . . It is an indefinite and meaningless writing which accomplishes nothing. The construction contended for by defendant stamps the contract in suit as such a writing. He gives no consideration to the presumption that a contract negotiated during the course of business is intended to achieve something definite and concrete."

This principle was followed only last year by the New York Appellate Division:

> "A businessman entering into a contract is not to be supposed to be entering into a futile or meaningless agreement. A provision that allows either party by his own breach to excuse his own performance is a commercial absurdity. Every part of a written agreement should be interpreted to give effect to its general purpose." (*Indovision Enterprizes* v. *Cardinal Export,* 44 App. Div. 2d 228, 230 (1st Dept. 1974).

In the preceeding statement of facts in pages 12, 16, the reports by defendants' Executive Vice President and Chief Geologist in Libya have been analyzed which contradict the generalities stated in the opinion of the Court, and are amply specific to bring the case within the numerous precedents where in the case of joint ventures courts have supplied necessary particulars from the experience of the industry. The Vaughan Report (Ex. E-204, 1943a *et seq.*) demonstrates the limited range and amount of such costs

in Libya. It even sets forth minor cost items such as costs of bits and the like.

The indefiniteness of the cost items left to future agreement in the *Lord* case is at least as great as any here. In *Lord* the parties embarked upon a unique adventure to strange and far away places scattered across the globe in 1932. The entire purpose of the enterprise was to do something that no one had ever done before—bring such a trip to an American audience through radio and film. The entire field was left open to future agreement between the parties concerning how extensive the advertising and promotional expenses of distribution should be, the amount and scope of which were not provided for but left to the future approval of both parties.

Allen & Co. retained some portion of the control which is inherent in the relationship by reserving the right mutually to approve the costs. This did not signify that either Occidental or Allen & Co. could be arbitrary or capricious in this regard. The fiduciary relationship between them as joint venturers takes care of that, "and the law fixes their rights in this regard". *Lindsay* v. *Marcus,* 137 Colo. 336, 325 P. 2d 267 (1958), quoting with approval from *Goss* v. *Lanin,* 170 Iowa 51, 152, N.W. 43 (1915). Quoting from *Lindsay* v. *Marcus,* it is stated in 2 Williston on Contracts, § 318A (3d ed. 1959) at p. 562:

> "Equity holds each joint adventurer strictly accountable for completing ventures and will not permit the unilateral withdrawal of one partner to the detriment of his fellow contractors without the consent of the latter," citing *Smaller* v. *Leach,* 136 Colo. 297 316 P. 2d 1030 (1957) and quoting also from *Kincaid* v. *Miller,* 129 Col. 552, 272 P. 2d 276 (1954).

Both parties were obligated to act reasonably and to approve reasonable costs of items attendant upon the venture. *Dent* v. *De Fabritis,* 260 Ala. 522, 71 So. 2d 279 (Sup. Ala. 1954) (sustaining as valid a contract which provided that the specifications to which a home was to be built were to be "Agreed upon by the parties").

See also, *Vineyard* v. *Martin,* 29 NYS2d 935 (not officially reported) (Sup. N.Y. 1941); *Pillois* v. *Billingsley,* 179 F. 2d 205 (2 Cir. 1950).

In his letter dated December 9, 1964 to Dr. Hammer which preceded the latter's letter of December 17, 1964, Herbert Allen stated (Ex. p. 67):

> "As per our agreement we are prepared to pay our 25% of the expenses whenever they are presented and will mutually with your good self approve or disapprove the various items."

The above quoted statement is clearly the meaning of the insertion in the letter of December 17, 1964 regarding mutual agreement as to costs. The letter of December 17th implied no arbitrary power in either party to disapprove costs. Reasonably construed this means that payment of items could be refused only if they did not pertain to protecting the common interests within the scope of the venture, and were not reasonably appropriate to the proper exploitation of the subject matter. Any future dispute as to propriety or reasonableness of costs is easily soluble by the Courts. This clause certainly gave no license to Occidental to go ahead on its own without extending any opportunity to Allen & Co. to participate or to compete.

III

Occidental cannot as matter of law contend that Galic did not turn up the concessions; in fact Galic turned up the concessions.

As we have shown it is legally irrelevant whether or not Galic turned up the concessions. When Occidental aborted the venture, concealed the facts from Allen & Co., misinformed Allen & Co., and seized the subject matter of the venture for itself without giving Allen & Co. a chance to compete or participate, it put itself beyond the pale. Its failure to act with "the punctilio of an honor the most sensitive" (*Meinhard* v. *Salmon,* 249 N.Y. 458, 464 (1928)),

halts any further inquiry. Nonetheless, for the sake of completeness and to answer directly all of the rulings made by the Court we discuss the issue of "turn-up".

(a) Occidental is barred, as matter of law, from asserting that Galic did not turn up the concessions.

Occidental may not legally assert that blocks 42B and 44 were not turned up by Galic, because seven months before they were awarded and a few days before the application therefor had to be filed, Occidental unilaterally directed Galic to desist from his efforts to aid in obtaining them (1845a); sought to supplant him by hiring other representatives in his place to promote the granting of the concessions (125a, 1163-1165) and gave him no further cooperation.

The period following July 29, 1965 was crucial for Galic inasmuch as this was when the Libyan government was considering the applications and when the Ministry of Petroleum was called upon by the Libyan law (2097a-8) to exercise "absolute discretion" in choosing between the 24 bidders which applied for block 42B and the seven bidders which applied for block 44 (1915a), both of which eventually were granted in the name of Occidental.

It was a manifest breach of the joint venture contract and of its fiduciary duties for Occidental to have interfered with or hindered Galic in turning up the concessions.

> "In every contract there is an implied undertaking on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part." (10 N.Y. Jur. Contracts § 203).
>
> "Once the defendant committed itself to the joint venture, it committed itself to the highest degree of responsibility toward its coadventurer, the plaintiff. It became no longer a matter of phrases and commas, but of the utmost good faith in permitting the plaintiff to enjoy the fruits of the venture without inter-

ference by the defendant." (*Madison Pictures Inc.* v. *Pictorial Films,* 6 Misc. 2d 302, 315, Sup. N.Y. 1956).

In the case last cited, involving a dispute between two sophisticated film companies which were joint venturers in a television enterprise, the Court said (p. 320 of 6 Misc. 2d):

> "This Court does find that the defendants were charged with the negative duty of not interfering with the fruits of the joint adventure; that they did so was without regard to the rights of the plaintiffs."

In *Amies* v. *Wesnofske,* 255 N.Y. 156, 162-3 (1931) the Court quoted from *Young* v. *Hunter,* 6 N.Y. 203 (1852), as follows:

> "It is a well-settled and salutary rule that a party cannot insist upon a condition precedent, when its non-performance has been caused by himself."

and added, quoting from 5 Williston on Contracts § 677 A (3d ed. 1961) at pages 233-34:

> *"It is as effective an excuse of performance of a condition that the promisor has hindered performance as that he has actually prevented it."* (Emphasis supplied.)

See also *Schefler* v. *Livestock & Casualty Ins Co.,* 44 App. Div. 2d 811 (1st Dept. 1974); *Cushman & Wakefield* v. *Dollar Land Corp.,* 44 App. Div. 2d 445 (1st Dept. 1974).

This rule prohibits a party from taking advantage of the failure of a condition if he has hindered its performance. The obligation to use good faith in carrying out what is agreed underlies all agreements even where the parties are dealing at arm's length. The obligation applies *a fortiori* where, as here, they are bound by a fiduciary relationship which binds joint venturers. Hence, Occidental is barred as matter of law from asserting that Galic did not turn up the concessions.

(b) The concessions were "turned up" by Galic within the meaning of the contract.

The term "turn up" as used in the agreement between plaintiff and defendant was introduced by Armand Hammer in his December 17, 1964 letter (Exh. P-70, 800a) to Herbert Allen. It does not mean that Galic had to be the procuring cause of the granting of the concessions, but that he would help, assist or intervene (515a-6; 612a). Occidental's counsel in his opening said that it included creating good will and visiting the Libyan ministers "to describe the responsibility of an independent company who is not known as Standard Oil was * * *'' (125a).

Hammer variously described what was expected of Galic and his group as using ''best efforts to obtain'' the concessions (514a), "assistance to us in obtaining" (466a), ''helping us to meet ministers of the cabinet'' (612a), ''be of considerable assistance to Occidental in getting concessions in'' Libya (506a), "helpful in our getting the areas" (561a) and indicated that Galic would accomplish what was expected of him "providing anything concrete came of this" (516a). That the Galic Group turned up the concessions is established firmly in the record by undisputed evidence (See *supra*, pp. 22-27).

(c) The Court erred in ruling that Kabazi's letter and his testimony are inadmissible hearsay.

The Court's rulings that the Kabazi letter and testimony are inadmissible hearsay are without any substance or merit (99a). The Kabazi letter and his testimony are clearly admissible and are not hearsay, and are direct evidence of the acts and statements that constituted Galic's performance (6 Wigmore on Evidence § 1766).

As the Court of Appeals pointed out in *General Tire of Miami Beach* v. *NLRB*, 332 F.2d 58, 60 (5th Cir. 1964):

> ''We must avoid, of course, the easy temptation to brush all of this aside as hearsay. We have, on numerous occasions, taken pains to point out that *when the*

fact to be proved is a word spoken, it is an uncritical error to protest as to hearsay. The verbal act, as any other act, may be proved by one who heard it, saw it, or felt it [citations omitted]." (Emphasis supplied)

In addition the Kabazi letter and testimony are as probative on the question of performance as in any broker's case where such evidence is clearly admissible for that purpose. *Hardy* v. *Primex Equities, Inc.*, 33 App. Div. 2d 648 (4th Dept. 1969); *Tanenbaum* v. *Nanes,* 247 App. Div. 907 (2d Dept. 1936); *Melkon* v. *Kirk & Co.*, 232 App. Div. 134 (1st Dept. 1931), or in any instance where performance is to be proved. *U.S.* v. *E.I. DuPont deNemours & Co.*, 126 F. Supp. 27 (N.D. Ill. 1954); *Property Repair Corp.* v. *Kingston Trust Co.*, 273 App. Div. 783 (2d Dept. 1947).

IV

Allen & Co. did not consent, and could not in any event be held to have consented to termination of the joint venture in view of Occidental's failure as a fiduciary to provide the information needed to make an informed decision.

The Court erred as a matter of law in holding that Occidental did not violate Allen & Co.'s rights in sending the termination notice at the eleventh hour, and that Allen & Co. acquiesced in or consented thereto, or that there was any laches or estoppel.

It is settled law that where, as here, there was no full disclosure by Occidental to Allen & Co. (indeed Allen & Co. was misinformed by Occidental) there can be neither acquiescence nor consent nor estoppel. It was a breach of Occidental's fiduciary duties to attempt to terminate without laying bare the entire truth in its full significance. And to make matters worse Occidental attempted to terminate at a point in time where it knew that Allen & Co. was foreclosed from any chance at the concessions through some other route.

(a) It is indisputable that as matter of law, the contract and venture were not terminable at will. They are presumed to continue until the objective is obtained or all reasonable efforts to attain the objective have been exhausted. *Hardin* v. *Robinson,* 178 App. Div. 724 (1st Dept. 1916), affd. 223 N.Y. 651 (1918); *Brown* v. *Leach,* 189 App. Div. 158 (1st Dept. 1919). Occidental could not throw out Allen & Co. at will if it decided that the Libyan enterprise was likely to be profitable, and that Occidental would benefit thereby.

As was stated in *Hardin, supra* (page 729 of 178 App. Div.):

> "But where a partnership has for its object the completion of a specified piece of work, or the effecting of a specified result, it will be presumed that the parties intended the relation to continue until the object has been accomplished. There is, then, a term fixed by the co-partnership agreement, and until that time arrives one partner cannot terminate the partnership and continue the enterprise for his own benefit."

To the same effect are *Eagle-Picher Co.* v. *Mid-Continent Lead & Zinc Co.,* 209 F. 2d 917 (10th Cir. 1954); *Libby* v. *L. J. Corp.,* 247 F. 2d 78 (D.C. Cir. 1957); *Horton* v. *Hall & Clark Mfg. Co.,* 94 App. Div. 404 (1st Dept. 1904); *San Francisco Iron & Metal Co.* v. *American Milling & Industrial Co.,* 115 Cal. App. 238, 1 P. 2d 1008 (Dist. Ct. App. 1931); *Lindsay* v. *Marcus,* 137 Colo. 336, 325 P. 2d 267 (1958); *Air Purification, Inc.* v. *Carle,* 99 Cal. App. 2d 258, 221 P. 2d 700 (Dist. Ct. App. 1950).

Occidental while making much of the proviso relating to mutual agreement on costs, does not assert that it terminated the venture because Allen & Co. refused to reach mutual agreement on costs. It knows that to make such assertion it would have to show that it submitted invoices or proposed costs to Allen & Co. which the latter rejected. The evidence is undisputed that that never happened. To

the contrary, Allen & Co. offered to pay costs when submitted (Exh. P-67; 179-a).

Occidental could not utilize the de Rovin report to exclude Allen & Co. and appropriate the venture by deciding unilaterally in advance that on account of de Rovin it would be impossible for Galic or Ogbi to turn up the concessions (See *supra*, pp. 13-20). Occidental could not do this even if de Rovin were *persona non grata* in Libya (which was untrue, see *supra*, p. 19). In *Dean Vincent, Inc.* v. *Russell's Realty, Inc.*, 521 P. 2d 334 (Ore. 1974) the plaintiff venturer was *persona non grata* and his participation would have killed the deal. Nonetheless the Court held that he was entitled to his share of the venture's commissions.

(b) At no time prior or subsequent to the writing of the purported termination letter on July 16, 1965, did Occidental inform Allen & Co. of anything about the progress of the joint venture. Specifically, it did not inform Allen & Co. of Vaughan's trips to Libya; of Vaughan's enthusiastic reports (Exh. P-204); of Vaughan's findings and conclusions that the Libyan venture was desirable, the economics were attractive, the cost of producing oil was about 10 cents per barrel as contrasted with $1.50 per barrel in the United States, the exploration risks low, the chances of finding oil very good, that there was a good chance of obtaining concessions; the progress which had been made toward getting concessions; or any of the other matters necessary in order for Allen & Co. to make an informed judgment or to determine a proper course of action (141a; 302; 303a; 337a; 338a; 343a; 350a-1; 353a; 354a; 355a; 356a; 367a; 477a; 478a; 479a; 480a; 481a; 482a; 487a; 488a; 496a; 546a-7; 557a; 561a; 583a; 592a; 602a; 603a; 612a; 618a; 619a-620a; 650a; 655a; 656a; 660a; 663a; 664a; 665a; 678a; 681a-2; 683a; 688a; 690a; 696a; 697a; 698a; 701a; 728a; 753a; 808a; 825a-6; 839a; 1440a-1). And to aggravate the concealment, Occidental misinformed Allen & Co. in the so-called termination letter that it had cancelled Ogbi (See *supra*, ftn. p. 27).

Occidental owed to Allen & Co. the duty to keep it fully advised of all aspects of the venture, including all acts or services performed by Occidental or by any other person in relation to the venture. Occidental's failure to keep Allen & Co. fully informed constituted breaches of Occidental's fiduciary duties to Allen & Co. *Meinhard* v. *Salmon,* 249 N.Y. 458 (1928); *C. H. Codding & Sons* v. *Armour & Company,* 404 F. 2d 1 (10 Cir. 1968); *Libby* v. *L. J. Corporation,* 247 F. 2d 79 (D.C. Cir. 1957); *Kaye* v. *Smitherman,* 225 F. 2d 583 (10 Cir. 1955), cert. den. 350 U. S. 913 (1955); *Dexter & Carpenter* v. *Houston,* 20 F. 2d 647 (4 Cir. 1927); *Eagle Picher Co.* v. *Mid-Continent Lead & Zinc Co.,* 209 F. 2d 917 (10 Cir. 1954); *Lindsay* v. *Marcus,* 137 Colo. 336, 325 P. 2d 267 (1958).

Any alleged consent of Allen & Co. to abandon or terminate the venture, whether express or implied, is null and void and without legal effect in the absence as here of full disclosure. *Wendt* v. *Fischer,* 243 N.Y. 439 (1926); *Matter of Hoyt,* 294 N.Y. 373, 380 (1945); *Matter of Young,* 249 App. Div. 495, 501 (2d Dept. 1937), affd. 274 N.Y. 543 (1937); *Northridge Coop.* v. *32nd Ave. Const. Corp.,* 10 App. Div. 2d 244, 248-9 (1st Dept. 1960), affd. 9 N.Y. 2d 818 (1961); *Matter of Hildreth,* 274 App. Div. 611, 614-5 (2nd Dept. 1949), affd. 301 N.Y. 705 (1950); *Gutman* v. *U.S. Casualty Co.,* 241 App. Div. 752 (2d Dept. 1934).

In *Wendt* v. *Fischer,* 243 N.Y. 439, 443 (1926), Judge Cardozo characterized the rule as to the quantum and quality of disclosure necessary to claim consent or acquiescence as follows:

> "Disclosure so indefinite and equivocal does not set the agent free to bargain for his own account or for the account of a corporation which acts through him alone. If dual interests are to be served, the disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all its stark significance [citations omitted.]."

In *White* v. *Sherman,* 168 Ill. 589, 48 N.E. 128 (1897), it was held that silence and non-interference by the *cestui* does not bind him as acquiescing in a breach of the trust.

> "The rule that beneficiaries cannot question the propriety of a trustee's act, omission, or transaction to which they have given their approval or consent is operative only where the trustee has made a full disclosure and the beneficiaries had full knowledge of all the material facts and circumstances, particularly those relating to the risk involved, or ought to have had such knowledge by reason of means and opportunities directly at their command. They must have had knowledge of, and understood, their rights. They must have been aware of the impropriety or breach of trust involved in the act, omission or transaction which they approved or to which they gave their consent." 54 Am. Jur. Trusts § 333 (1945).

In *Matter of Mendleson,* 46 Misc. 2d 960, 977 (Surr. Albany 1965), the Court said:

> "The rule on ratification in this State is expressed as follows in *Matter of Ryan* (291 N.Y. 376, 417). Quoting *Adair* v. *Brimmer* (74 N.Y. 539) the court said: 'To establish a ratification by a *cestui que trust,* the fact must not only be clearly proved, but it must be shown that the ratification was made with full knowledge of all its material particulars and circumstances, and also in a case like the present that the *cestui que trust* was fully apprised of the effect of the acts ratified, and of his or her legal rights in the matter. * * * The Maxim *"Ignorantia legis excusat neminem"* cannot be invoked in such a case.' * * * The trustee has not made it clear in this record that the *cestui que trust* was fully aware of his rights and he cannot be deemed to waive that which he did not know he had (*Werking* v. *Amity Estates,* 2 N.Y. 2d 43 (1956); *Matter of Graham,* 39 Misc. 226). The abandonment

must be deliberate and informed (*Matter of Miller,* 162 Misc. 563).'' (Emphasis the Court's).

> "An uninformed or invalid consent is tantamount to no consent at all (cf. *Birnbaum* v. *Siegler,* 273 App. Div. 817)." *Darrah* v. *Kite,* 32 App. Div. 2d 208, 210-11 (3d Dept. 1969).

In *Arakjinjian* v. *Arakian,* 268 App. Div. 41, 44 (1st Dept. 1944), the Court ruled that after a fiduciary relationship was established,

> "it then became incumbent upon defendants to show affirmatively that no deception had been practiced, no undue influence had been employed and that everything was fair, open, voluntary and well understood. (*Cowee* v. *Cornell,* 75 N.Y. 91, 99-100; *Matter of Will of Smith,* 95 N[illegible], 522; *Barnard* v. *Gantz, et al.,* 140 N.Y. 249[illegible] *Babcock* v. *Clark,* 79 App. Div. 502, 507)."

The fact that the Allens were experienced business people does not alter the applicability of this rule. The plaintiff in *Meinhard* v. *Salmon,* 249 N.Y. 458 (1928) was one of the leading textile factors in the United States. Yet, in no case has the fiduciary responsibility of the managing joint venturer (the defendant Salmon) been more rigorously enforced.

In the oft cited case of *C. H. Codding & Sons* v. *Armour & Company,* 404 F. 2d 1, 4 (10 Cir. 1968), it was said:

> ''And when, as here, one party is given managerial authority requiring affirmative consent of the other party only in specified cases this duty of openness and full disclosure is accentuated. *Bosworth* v. *Eason Oil Co.,* 202 Okl. 359, 213 P. 2d 548 (1949).'' *C. H. Codding & Sons* v. *Armour & Company,* 414 F. 2d 1, 4 (10 Cir. 1968).

And again in the same case:

> "The argument overlooks the nature of a joint venture and the fiduciary duty owed by the manager to the venture and the co-adventurer." (414 F. 2d at p. 5)

In *Libby* v. *L.J. Corp.,* 247 Fed. 2d 78, 82 (D.C. Cir. 1957), it was said by the present Chief Justice of the United States:

> "Where one of the members acts as 'captain' or 'manager' of the venture, the necessity for a full disclosure becomes more acute and rests more heavily on him."

See also, *Lindsay* v. *Marcus,* 137 Colo. 336, 325 P. 2d 267 (1958).

Accordingly, as matter of law, where, as here, Occidental did not lay bare all of the facts in all of their full significance, but concealed material facts about the venture and misinformed Allen & Co. about one member of the Galic group, its attempted termination is null and void. There can be no consent, express, implied, or tacit, to such a void termination. By no stretch of the imagination could there be an estoppel against Allen & Co.

(c) The purported findings of consent or acquiescence, with or without knowledge, were based upon evidence lacking probative force. The Court's opinion shows that its findings of consent, acquiescence and estoppel are based on untenable propositions. This being so, it is submitted that these findings that plaintiff consented or acquiesced in the termination of this joint venture cannot stand.

(1) The Court indulged an inference of consent from the fact that plaintiff did not reply to Occidental's "cancellation" letter of July 16, 1965. Under the decisions no inference of acquiescence or consent can be drawn from failure to answer. *Viele* v. *McLean,* 200 N.Y. 260, 262 (1910), where the Court said:

> "'Reasons may exist why he may choose and has a right to remain silent and to vindicate himself at some

future period and on some more opportune occasion' (*Talcott* v. *Harris,* 93 N.Y. 567, at p. 571; *Learned* v. *Tillotson,* 97 N.Y. 1).''

"The mere failure of a person to answer a letter addressed to him is not to be construed as an admission. * * * So, sending a letter which contained a voluntary and uninvited statement of plaintiff's claim, not part of any correspondence, nor an answer to any communication, is a mere declaration of plaintiff in his favor, and the fact that it was left unanswered does not make out an admission so as to make the letter competent evidence in support of the claim." 21 N.Y. Jur. Evidence § 298 (1961).

(2) The Court's opinion also shows that it gave weight to the contents of an underwriters' questionnaire and of a prospectus relating to a bond issue of Occidental issued in June, 1966, for which Allen & Company, Incorporated (a separate entity from Allen & Co.), was one of the three underwriters. The facts concerning this are set forth in greater detail at pages 28-31 *supra*. The burden of proof was held to be on Occidental to show that Charles Allen or Herbert Allen knew about the allegedly detrimental statements or omissions contained in these instruments or was in some manner responsible therefor. The Court recognized that the only possible bearing which either document could have on this litigation would consist in its being used as an admission against interest by Allen & Co. and then only if it could be connected up with Allen & Co.

Neither of the Allens nor anyone else connected with Allen & Co. was shown to have had anything to do with either of these documents, but the Court held that Allen & Co. was bound by them for the reason that Charles Allen and Herbert Allen were directors of Allen & Company, Incorporated, Herbert also having been chairman of the board. At the trial plaintiff's counsel objected explicitly and repeatedly to the introduction in evidence

of each of these documents and to the Allen brothers being questioned in regard to them (e.g. 214a; 217a; 219a; 220a; 221a; 228a; 395a; 402a-3). Both denied knowing what was recited in the prospectus or in a questionnaire, which was signed only by the corporation. It was prepared by Lehman Brothers and signed on behalf of Allen & Company, Incorporated, as a routine matter by its office manager. No claim is being made by any bondholder based on the prospectus or questionnaire, nor is this a disciplinary proceeding of any sort by the SEC. No estoppel can arise under such circumstances. *Dodge* v. *Richmond,* 10 App. Div. 2d 4 (1st Dept., 1960), affd. 8 N.Y. 2d 829 (1960).

Even if the manager of the corporation had known of the Libyan joint venture when he signed the underwriters' questionnaire, of which there is no evidence, this would not have charged either of the Allens or Allen & Co. with knowledge or notice of the contents of either document notwithstanding the positions of either of the Allen brothers on the board of directors of the corporation. The Court was clearly in error in holding to the contrary. *Briggs* v. *Spaulding,* 141 U.S. 132 (1891); *Reno* v. *Bull,* 226 N.Y. 546, 555 (1919); *Rives* v. *Bartlett,* 215 N.Y. 33, 36-7 (1915); *Arthur* v. *Griswold,* 55 N.Y. 400 (1874); *Utley* v. *Clarke,* 16 F. Supp. 435, 438 (S.D.N.Y. 1936).

Exactly parallel questions arose in each of the cases just cited. In *Reno* v. *Bull,* it was held that a complaint in another action verified by the vice-president and a director of a corporation was not admissible as an admission against interest of the defendants who were co-directors, citing the other New York cases above cited. In the *Arthur* case it was held (55 N.Y. at p. 406) that the "mere fact of being a director and stockholder is not *per se* sufficient to hold a party liable for the frauds and misrepresentations of the active managers of a corporation. Some knowledge of and participation in the act claimed to be fraudulent must be brought home to the person charged (51 N.Y. 27)."

In the *Briggs* case the United States Supreme Court held that directors of a national bank are not responsible for acts or omissions of other directors or agents of the bank, unless the loss is a consequence of their own neglect of duty. In the *Utley* case the Northern District of New York held that the plaintiff therein as vice-president and a director was not chargeable with knowledge of what the corporate books showed concerning a transaction for which he was sought to be held personally liable (cf. § 624, Bus. Corp. L. and *Matter of Hayes,* 153 Misc. 233 (Sur. Kings 1934). Neither Charles nor Herbert Allen nor Allen & Co. ever owned any stock of the corporation (D-14), nor is there any evidence that either Charles or Herbert Allen knew anything about the contents of the prospectus or the underwriters questionnaire.

The attempt to draw an adverse inference against Allen & Co. from the fact that no reserves were set up on its books with respect to the venture (93a) flies in the face of the SEC regulation that the making of such entries before the discovery of oil is prohibited by Regulation 240.15c3-1 adopted under the Securities Exchange Act of 1934 (17 C.F.R. § 240.15c3-1 (1974), 2 CCH Sec. Law Rep. ¶ 25,126). Nor could Allen & Co., whose books were kept on a cash basis, accrue liabilities on its books, contingent or otherwise. And indeed Occidental made no accrual on its books or in the prospectus for the venture even though its accounts were kept on an accrual basis (pp. 9-10 and 61 of Exh. D-11).

The extensive consideration given by the Court to the prospectus and questionnaire as a basis for finding that Allen & Co. acquiesced in and consented to the cancellation of this joint venture was, therefore, totally unwarranted in law, and the circumstance that so much weight was given to the contents of these documents in arriving at that finding, along with the equally unwarranted inference that consent was presumed from failure to answer the "cancellation" letter effectively destroys such findings as matter of law.

CONCLUSION

The judgment and findings adverse to plaintiff should be reversed on the law with costs and judgment granted in favor of plaintiff for the relief demanded in the complaint or such other relief in favor of plaintiff as to the Court shall seem just and proper.

Respectfully submitted,

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hereby admitted this 14th day

of FEBRUARY, 1975

Phillips, Nizer, Benjamin, Krim & Ballon

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